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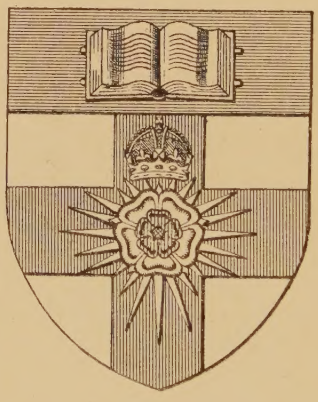

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THE

LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND HENRY BOMPAS,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. I.

FROM MICHAELMAS TERM, 1865, TO TRINITY TERM, 1866.

XXIX VICTORIA.

LONDON:

PRINTED FOR THE COUNCIL OF LAW REPORTING

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14 CHARING CROSS.

PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

1866

BIBL. LONDIN UNIV.

JUDGES

OF

THE COURT OF COMMON PLEAS

XXIX VICTORIA.

The Right Hon. Sir WILLIAM ERLE, Knt., C.J.
Sir JAMES SHAW WILLES, Knt.
Sir JOHN BARNARD BYLES, Knt.
Sir HENRY SINGER KEATING, Knt.
Sir MONTAGUE EDWARD SMITH, Knt.

ATTORNEY GENERAL.

Sir ROUNDELL PALMER, Knt.

SOLICITOR GENERAL.

Sir ROBERT PORRETT COLLIER, Knt.

ERRATA.

Page	*Line*	*For*	*Read.*
47	15 from top, dele "Byles."		
108	note (2)	22 L. J. (Q.B.) 217 ..	32 L. J. (Q.B.) 217.
130	between lines 6 and 7 in the left-hand column of the note, insert "shall be entitled to vote for the county; and by 6 Vict. c. 18, s. 74, it is provided that no trustee of any lands or tenements"		
135	note (1)	Doug. 624	2 Doug. 624.
193	10 and 11 from top ..	transfer	traverse.
198	bottom line	(1)	(3)
—	insert note (3) 8 C. B. (N.S.) 666; 30 L. J. (C.P.) 68.		
199	dele note (1) 8 C. B. (N.S.) 666; 30 L. J. (C.P.) 68.		
205	note (1), line 14 ..	surrender	summons.
235	16 from bottom, dele "not."		
306	add at end of first paragraph of head-note, "On the 4th of March, the plantiffs (B. & Co.) having received A.'s letter of the 3rd, effected with the present defendants the policy now sued upon."		
310	note (1)	2 N. C. 761	2 Bing. N. C. 761
342	13 from top	defendant	plaintiff.
—	6 from bottom	indorsee's	indorser's.
441	before "Lock v. Furze," insert "[In the Exchequer Chamber]."		
476	15 from top dele (1), and corresponding reference.		
484	head-note, top line ..	sell to	purchase of.
540	bottom line	Liverpool	Bristol.
569	end of bottom line, insert "I"		

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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXIX VICTORIA.

1865
Nov. 9.

GIBSON AND ANOTHER *v.* HOLLAND.

Statute of Frauds, 29 *Car.* 2, *c.* 3, *s.* 17:—*Letter to an agent sufficient memorandum.*

A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds.

THIS was an action to recover the price of a horse bargained and sold by the plaintiffs to the defendant.

Plea, never indebted.

The cause was tried before Willes, J., at the last Devonshire Summer Assizes. The plaintiffs, Gibson and Luke, are horse-dealers at Exeter. The defendant is a gentleman who occasionally deals in horses. Having heard from one Rookes, a horse-dealer of Exeter, that the plaintiffs had a mare which was likely to suit him, and having seen and approved of her, the defendant authorized Rookes to buy her for him, if he could, for forty guineas. Rookes

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accordingly made the purchase at that price, and communicated that fact to the defendant in a letter, as follows :—

"15th May, 1865.

"I have heard from Mr. Gibson and seen Tom Luke this morning, respecting the bay mare, and *have bought her for forty guineas.* Will you, therefore, forward me your cheque, with instructions how she is to be sent?

Wm. Rookes."

Receiving no reply, Rookes addressed the following letters on the 20th and 23rd of May, 1865, respectively, to the defendant :—

"I wrote you on Monday last to say I had, *in accordance with your request, purchased Mr. Gibson's bay mare for you at forty guineas,* requesting you would send me a cheque, with instructions how to forward her. Not having received any reply, I fear you must have been absent. Please send me cheque at once, with necessary instructions.

Wm. Rookes."

"I cannot but express my surprise at not having received any reply to my letters of the 15th and 20th. In the first *I informed you that I had purchased Mr. Gibson's bay mare;* and in the second *I asked you to send a cheque for the same,* viz. 42*l.*, in order that I may settle with him. Mr. Luke has called again this morning; and it makes me look very foolish, as of course they look to me to fulfil my contract; and I hope that you will, on the receipt of this, send me the cheque, with the necessary instructions how the mare is to be forwarded.

Wm. Rookes."

On the 25th of May, 1865, the defendant wrote to Rookes, as follows :—

"I only returned home yesterday evening, or I should have at once answered your first letter, and sent you a cheque for the mare *which you were kind enough to buy for me.* I am glad to say I have sold her to Mr. Toynbee. When I told him of her, he said he knew her well, and would buy her from me, which he did; and you will receive a cheque for her from me by this evening's post.—

C. Holland."

On the 26th of May, Rookes wrote in reply to the last letter :—

"Mr. Toynbee has never seen the mare that you have purchased.

The one he alludes to I sold Mr. Gibson for Sir L. P., and she is not for sale at any price. You will, therefore, please to rectify this mistake, and send me your cheque, as it is a fortnight to-morrow since *I bought her for you,* and she has been standing at livery ever since.

Wm. Rookes."

On the 10th of June, Rookes again wrote to the defendant:—

"Mr. Gibson and Mr. Luke called here this afternoon; and, as they have both failed in seeing you in London, they now call upon me to complete *my contract* for the sale of the mare. You are fully aware that *you commissioned me to buy the mare for you;* and, had I thought there would have been any trouble or annoyance, I should have had nothing to do with it; but, simply acting as your agent, I must request that you will at once remit me your cheque for 42*l.*, cost price, together with half the keep, two guineas, as it is a month ago next Monday that I bought her for you, and she has been standing at livery ever since, and they have a perfect right to claim the whole of the keep.

Wm. Rookes."

On the 16th of June, Rookes again wrote to the defendant:—

"Messrs. Gibson & Luke have been and seen me again to-day respecting the bay mare *which you told me to purchase from them for you;* and they have threatened me with an action," &c.

Rookes having on the 17th of June received a letter from the plaintiffs' attorneys, demanding payment from *him* of 46*l.*, alleged to be due from *him* for a brown mare sold by them *to him,* and her keep, sent it to the defendant, writing:—

"This morning's post brought me the inclosed from Messrs. Gibson & Luke's solicitors; I really do hope that you will not allow me to be put to any further trouble or annoyance in this most unpleasant matter, but at once remit your cheque either to me. If they sue me, I have no alternative but to sue them or you."

On the part of the defendant it was objected that there was no contract in writing to satisfy the 17th section of the Statute of Frauds. (1) For the plaintiffs it was insisted that the correspondence amounted to a contract, or at all events to a sufficient memorandum of a contract to charge the defendant.

(1) 29 Car. 2, c. 3.

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Under the direction of the learned judge, a verdict was found for the plaintiffs for the sum claimed, reserving to the defendant leave to move.

Karslake, Q.C., moved to enter a nonsuit. It is submitted that the correspondence between the defendant and Rookes did not amount to a contract between the former and the plaintiffs, whatever might have been the case had Rookes been suing; and that there was not even a *memorandum* of the *contract* signed by Rookes as the defendant's agent.

[ERLE, C.J. Suppose the defendant had written to Rookes acknowledging the contract made by the latter on his behalf, would not that have been a sufficient memorandum in writing of the bargain to satisfy the statute?]

It is submitted that it would not. In equity it has been said that an admission of a contract, contained in a letter written to a third person, will be a sufficient memorandum to satisfy the requirement of the 4th section: *Sugden's V. & P.*, 11th edit. 122, cited arguendo in *Leroux* v. *Brown*. (1) But, at law, to satisfy the 17th section, there must be complete evidence of the contract in writing, —a vendor, a vendee, the subject-matter, and the price. In no part of the correspondence here relied on is there any admission of any bargain made by the defendant with the plaintiffs. At the utmost, it only amounts to an admission of liability to Rookes.

[WILLES, J. In *Bailey* v. *Sweeting*, (2) this court held a letter which contained an admission of the bargain, and of all the substantial terms of it, to be a sufficient memorandum to satisfy the 17th section, although the writer at the same time repudiated his liability. The correspondence here states a purchase of the horse from the plaintiffs under circumstances which made the defendant the principal; and the defendant admits that, and promises to send a cheque. I think there was evidence that Rookes was the agent of both parties.]

[ERLE, C.J. Putting all the letters together, there is a writing in which the contracting party who is sued states to his agent that a contract has been made on his behalf for the purchase of the

(1) 12 C. B. 801, 818; 22 L. J. (C. P.) 1.

(2) 9 C. B. (N. S.) 843; 30 L. J. (C. P.) 150.

plaintiffs' bay mare for 42*l*. Is not that a sufficient note or memorandum in writing of the contract?]

It only amounts to an acknowledgment of liability to Rookes, the person to whom the defendant's letters are addressed, not to a memorandum of a contract such as the statute requires.

ERLE, C.J. I am of opinion that there should be no rule. The contract for the purchase of the mare in question was made by Rookes. If Rookes was the agent of both parties, there was nothing to reserve; therefore I place no reliance on that. But I am of opinion that the letters put in, taken together, do amount to a sufficient note or memorandum of the contract within the 17th section of the Statute of Frauds. Apart from the statute, it is beyond doubt that Rookes made a contract on behalf of the defendant to buy the plaintiffs' mare. The defendant relies upon the 17th section, which enacts that no contract for the sale of any goods, &c., for the price of 10*l*. or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest or part payment, or unless "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The defendant's letters amount to a clear admission that Rookes did make, on his behalf, the contract which is described in that correspondence. But the objection relied on, is, that the note or memorandum of that contract was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other. The object of the Statute of Frauds was, the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent would be the more satisfactory evidence of the two. Then, how stand the

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authorities on the subject? In *Leroux* v. *Brown*, (1) in support of the position that a letter addressed by the defendant to a *third person*, containing an admission of a contract with the plaintiff, will be enough to charge the former, Sir G. Honyman refers to *Sugden's V. & P.*, 11th edit. 122, where it is said that "a note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will be a sufficient agreement to take a case out of the statute;" and for this the learned author vouches Lord Hardwicke, who, in *Welford* v. *Beazely*, (2) says:—"The meaning of the statute is, to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and, therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on: *Hawkins* v. *Holmes*. (3) There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provisions of it." (4) Sir E. Sugden goes on to say that "the point was expressly determined in the year 1719, in the court of Exchequer. Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page were of opinion that the letter was a writing within the Statute of Frauds": *Smith* v. *Watson*. (5) These cases, it is true, arose upon the 4th section of the statute, but the analogy holds equally good as to the 17th section. In the case referred to by my Brother Willes, of *Bailey* v. *Sweeting*, (6) this court went very fully into the general doctrine, and came to the conclusion that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy the 17th section, notwithstanding the writer repudiated his liability. To satisfy the

(1) 12 C. B. 818; 22 L. J. (C. P.) 1.
(2) 3 Atk. 503.
(3) 1 P. Wms. 770.
(4) See Clerk *v.* Wright, 1 Atk. 12.
(5) Bunb. 55.
(6) 9 C. B. (N. S.) 843; 30 L.J. (C. P.) 150.

statute, you must have the oral statement of the contract corroborated by an acceptance of part of the goods or a part-payment of the price, or you must have some note or memorandum in writing of the bargain. If so, the danger of perjury, which the statute was designed to exclude, is abundantly guarded against if there be a written statement of the terms of the contract, signed by the party to be charged, made to an agent. For these reasons, I feel bound to hold that the requirements of the statute have been complied with in this case, and consequently that there should be no rule.

WILLES, J. I agree. The statute, in section 17, imposes it as a condition to the validity of a contract for the sale of goods for the price of 10*l.* and upwards, either that there shall be an acceptance of part of them, or that something shall be given as earnest or in part-payment of the price, or that there shall be some note or memorandum in writing of the bargain, signed by the party to be charged, or by his lawfully authorized agent. Whether Rookes was the agent of the plaintiffs as well as of the defendant, I do not stop to inquire. But I think the series of letters, read together, contains a statement of the bargain, and an admission by the defendant that Rookes bought the mare of the plaintiffs on behalf of the defendant, and for the price mentioned therein. The parties are named in a writing signed by the person who is sought to be charged; and the subject-matter of the contract and the price are both mentioned. Nothing is wanting to make a complete memorandum of the bargain, unless it be necessary that the document should be addressed to the person who is to take advantage of it. I apprehend the 17th section imposes no such condition. Both the 4th and the 17th section seem to be framed for the purpose of absolving contracting parties from liability, unless, under section 4, the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing and signed, &c., or, under section 17, unless there be acceptance or part-payment, or some note or memorandum in writing of the bargain made and signed by the party to be charged thereby,—the words of the latter clause not bearing quite so comprehensive a meaning as those of the former. Taking the 17th section, which stands upon a different footing from the 4th in the particulars which

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called for the interference of the legislature in the recent Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, and on which our judgment must proceed, there is a total absence of any indication of intention that the note or memorandum must be addressed or delivered to the person who is to have a remedy upon it: all the section requires, is, that there shall be written evidence of the contract. Provided you have in writing an admission by the party to be charged of the bargain having been made, the requirement of the statute is satisfied, though the memorandum does not shew a contract in the sense of its being a complete agreement, and intended to be the exclusive evidence of the right on the one side and of the liability on the other, as the final written agreement between the parties would be. This section uses a word which seems to afford a key to its construction; it requires that there shall be, not any particular kind of memorandum, but "*some* note or memorandum of the bargain." There is a note or memorandum of the bargain in this case. I cannot help thinking that *Bailey* v. *Sweeting* (1) disposes of this case, because, though the memorandum there did not shew a contract in the sense of an agreement, inasmuch as the defendant in terms repudiated his liability, yet, as the letter contained evidence of the terms upon which he had once contracted to be bound, it was properly held to be a sufficient memorandum to satisfy the statute. Great difficulty has arisen as to the construction of this section, as being applied to evidence only: and I have, on former occasions, expressed the inability I felt to understand the case of *Leroux* v. *Brown*, (2) though of course we are bound by it. It affords, however, a remarkable confirmation of the correctness of the construction we now put upon the statute, however questionable some persons may have thought the decision to be. There is another difficulty. It has been held that the memorandum must exist before the action is brought: *Bill* v. *Bament*. (3) This would seem to shew that the memorandum is in some way to stand in the place of a contract. But I cannot help thinking that the

(1) 9 C. B. (N. S.) 843; 30 L. J. (C. P.) 150.

(2) 12 C. B. 801; 22 L. J. (C. P.) 1. See note to Birkmyr *v.* Darnell, 1 Sm. L. C. 5th ed. 272; and see Williams *v.* Wheeler, 8 C. B. (N. S.) 299, 316.

(3) 9 M. & W. 36.

courts, in deciding cases of that description, considered the intention of the legislature to be of a mixed character,—that it was intended to protect persons from actions being brought against them to enforce contracts of which there was no evidence in writing, and that the written evidence should be existing at the time when the action is instituted. It is too late, however, now to object to those cases. I come round to the section itself. There is no authority which compels us to accede to the construction which Mr. Karslake asks us to put upon it. There is no reason for it: and I think it would be doing violence to the language used. I think the letters in question do constitute a sufficient memorandum of the contract to answer all the requirements of the statute.

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BYLES, J., who had not heard the whole of the argument, expressed no opinion.

KEATING, J., concurred.

Rule refused.

JEGON *v.* VIVIAN.

Nov. 25.

Devise—Leasing power—Mining Lease—Receiver.

A testator, by a will made in 1798, devised all the residue of his real estates to his daughter for life, without impeachment of waste, save as thereinafter mentioned, and with a restriction against alienation, remainder to her first and other sons in tail, with some other remainders, remainder to T. P. in tail, remainder to the testator's right heirs. The will contained powers to the devisee for life to charge the property to a limited extent in favour of her husband and children; and it then gave to her, and to each tenant in tail, power to lease any of the *lands* for twenty-one years, and no more, for the best improved rent that could be got for them, with a reservation to the lessor of the right to work and take mines and minerals thereunder. Then followed a special reservation of all timber, woods, and underwood for twenty years from the testator's death. The will then proceeded: "And it is my will and desire, and I do hereby order and direct. . . . . *that it shall and may be lawful for my said daughter to work, or contract for, lease, or let out to be worked and wrought*, all the coal, culm, &c., or other ore, mines, and minerals which are already known and discovered, or which may be hereafter found out and discovered in or under my real estates," the "issues, proceeds, and profits," to be paid over to trustees, and to be by them laid out in the purchase of lands, to be settled to the same uses, &c., as the rest of the testator's estate. The devisee for life, who was the testator's only child, in 1840, in the exercise of this power, demised to M., for *twenty-one* years (or for *sixty* years, if she had authority to do so), "all the mines, &c., of coal, culm, &c.,

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under three farms described, with liberty to the lessee, his executors, &c., to use all lawful means for finding any coal or culm, and raising it and disposing of it; to make shafts, watercourses, and railroads, and to use a sufficient part of the said land for placing coal to be raised therefrom, *and also any other coal;* to erect engines for working the said mines, *or any other mines;* to build houses for the miners working the demised mines, *or mines belonging to any other person;* to do all such other acts in, under, or upon the said farms *as shall be deemed expedient in working the mines and seams of coal hereby demised,* or *belonging to any other person;* and to have ingress and egress for customers to carry away coal from the said mines, or *belonging to any other person;* making satisfaction to the tenants and occupiers for any damage occasioned by the liberties aforesaid." An annual rent of 40*l.* and certain royalties were reserved, and the lessee covenanted to pay rent, &c., to work the mines in a workmanlike manner, to make satisfaction for damage, &c. In ejectment by T. P., the remainder-man, against the lessee, the jury having found that the covenants contained in the lease were "usual, ordinary, and reasonable" covenants:—

Held, by *Erle*, C.J., and *Willes*, J., that the will gave the devisee for life an unconditional power to lease the mines, without any other limit for the duration of such leases, and any other condition for the exercise of the power, than would attach to and arise from the fiduciary capacity of the donee of the power; and that the lease of 1840 was a good exercise of that power; for that, if some of the licences thereby granted were ultra vires, the lease might be void pro tanto, and valid for the residue.

Held, by *Byles*, and *Montague Smith*, JJ., that the provision as to mining leases had reference to the restrictions upon the right of the tenant for life to commit waste, mentioned in the earlier part of the will, and was a mere *working power* over the minerals, given to the tenant for life, accompanied with restrictions as to the disposition of the proceeds, compelling her to capitalise the issues and profits for the benefit of those in remainder; and, consequently, that the lease was void, or, at all events, could not extend beyond the life of the devisee for life.

Held, by the whole Court, that the receipt of rents, under a lease made by tenant for life in the supposed exercise of a power conferred upon her by a will, by a receiver appointed by the court of Chancery during the minority of the remainder-man, does not create a tenancy from year to year; nor does the acceptance by the remainder-man from the receiver, on attaining his majority, of the accumulated rents which had been so received, amount to a confirmation of the lease, or create the relation of landlord and tenant.

LEONARD BILSON GWYN, of Glyn Abbey, in the county of Carmarthen, by his will, dated the 17th of March, 1798, after disposing of his personal estate, and some of his real estate, and providing for payment of his debts, devised all the residue of his real estate to his only child Catharine Middleton Gwyn for life, without impeachment of waste, except as thereinafter mentioned; remainder to the use of her sons successively in tail; remainder to her daughters successively in tail; remainder to such of three persons

named as the testator's daughter should by will direct; remainder, in default of such direction, to the Rev. T. Powell in tail; remainder to the testator's right heirs for ever. The will, after authorizing the testator's daughter to charge the estates for portions for younger children, contained the following leasing powers:—

"And I do hereby further impower, and it is my will and meaning that my said daughter, and all and every other person or persons who, under the limitations of this my will, when they respectively shall become seised and possessed of my said real estates, may, and I do hereby expressly impower them respectively, to grant leases of all or any part or parts of my said real estates not devised for payment of my debts, for the term of twenty-one years and no more, taking and reserving therein the best improved rent that may be had or reasonably gotten for the same, payable half-yearly to the person or persons who shall by virtue of this my will be entitled to and be in the actual possession of my said estate successively, so as such leases are made to commence in possession, and not in reversion or by way of future interest; and also so that by such leases the tenant or tenants be restricted from the commission of waste, and from assigning their interest therein without the consent of the person entitled to the possession and perception of the rents and profits of such estates for the time being under the limitations herein contained; and also that a special reservation be made in every such lease, impowering my said daughter during her life, and such person or persons as shall respectively become possessed of such my real estates after her decease, and their assigns, labourers, and workmen, to search for, dig, delve, land, work, take, and carry away any coal, culm, iron-ore, or other ore, mines, or minerals whatsoever, or for the purpose of cutting down or grubbing up any timber, wood, or underwood, and manufacturing the same." The will then proceeded: "And whereas it is my intention and wish that all the timber, woods, and underwoods now growing and being in and upon such my real estates as are not devised for the payment of debts, shall be carefully preserved for twenty years, to commence from the day of my death, It is my will and meaning, and I do hereby direct, that neither my daughter or any other person whomsoever who, under the limita-

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tions of this my will, may become entitled to the possession of such of my real estates, shall have any right or power to grub up, uproot, fell, or cut down any wood or timber, underwood, or to cut down any trees planted or being in or upon any part of my estates (except only for the absolute and necessary reparation or rebuilding of any houses, messuages, or tenements belonging thereto), until the expiration of the aforesaid term of twenty years; and, in case my said daughter, or any other person who shall be in possession of such my estates by virtue of and under the limitations herein contained, shall cut down or uproot any such tree or timber, woods, or underwood, contrary to the aforesaid restrictions, he or they shall immediately forfeit and pay the sum of 100*l.* for every tree so cut down, grubbed up, or uprooted, and for every acre of underwood so cut down, grubbed up, or uprooted contrary to the directions above given the sum of 40*l.*, which said several penalties I hereby order and direct to be paid to the person who shall be next entitled to the reversion of such my estates, for his own use and benefit,"—with power of distress. The testator then proceeded, "And it is my will and desire, and I do hereby order and direct, that all trees, timber, woods, and underwood which shall be cut down, grubbed up, or uprooted, shall not be applied to any other purpose whatsoever save only for the payment of my just debts, legacies, and funeral expenses; *And that it shall and may be lawful for my said daughter to work, or contract for, lease, or let out to be worked and wrought,* all the coal, culm, lime-rock, and all iron-stone, lead, copper, and tin mines, or any other ore, mines, and minerals whatsoever which are already known and discovered, or which may be hereafter found out and discovered in or under such of my real estates as are not specifically hereinbefore devised for the payment of my debts, legacies, and funeral expenses; and that all the issues and net proceeds and profits arising therefrom shall, from time to time as the same shall arise, be paid over by my said daughter to my said trustees and their heirs, and by them in the first place applied in payment of any of my debts, in case the personal and real estates hereinbefore devised towards payment of debts should happen to prove insufficient; and, after payment of the whole thereof, that my said daughter should, by and with the consent of my said trustees, punctually, as occasion

and opportunity shall offer, lay out the same in the purchase of real estates in the several parishes of Llanon and Llangendeirne, in the county of Carmarthen, in preference to any other parish or place whatsoever, and if not in the aforesaid parishes, then in the purchase of such real estates as may be purchased in the Commoth of Kidwelly, Camawllon, and Iskerman, in the same county: And it is my intent and meaning that such purchased premises should be conveyed and settled to the same uses, upon the same trusts, and subjected to like limitations, reservations, and conditions in all respects as my said real estate not specifically bequeathed for the payment of my debts, legacies, and funeral expenses, are by this my will devised and settled, and for no other use, end, intent, and purpose whatsoever; and that the rents and profits of such purchased premises, when and as often as the same shall happen to become due, from the date of such purchase or purchases as aforesaid, shall be received by my said daughter in the same manner as the rents and profits of my said real estate are directed to be paid to and received by her, for the term of her natural life; and that the interest of such moneys as shall arise from the working of such collieries, iron-stone, or any other mines or minerals whatsoever, shall, until such purchase be made, be laid out at interest, and added to the principal for to be applied in the purchase of such real estates."

The testator, Leonard Bilson Gwyn, died in July, 1798.

On the 2nd of May, 1840, his daughter and only child, the tenant for life, Catharine M. Gwyn (then Countess de Wuits), in consideration of the rent, royalties, and covenants therein reserved and contained on the part of the lessee, "by force and virtue of the power and authority to her given or reserved in and by the last will and testament of the said Leonard Bilson Gwyn, her late father, deceased," demised (with confirmation, by her husband) to one Martin, his executors, administrators, and assigns, "All the mines, veins, groves, beds, and seams of coal and culm, and quarries of stone whatsoever, which are already known and opened, or which shall hereafter be discovered and opened in, upon, or under all those messuages, tenements, farms, lands, and hereditaments called or known by the several names following (that is to say), All that and those messuage or tenement, farm, and lands

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called Pen Place, now or late in the tenure or occupation of W. Rogers, and also All that and those messuage or tenement, farm, and lands called Pentre Garrow, now or late in the tenure or occupation of John Williams, and also All that and those messuage or tenement, farm, and lands called Cadley, now or late in the tenure or occupation of W. Rees, all in the parish of Llangavelach, in the county of Glamorgan, together with full and free liberty, power, and authority for Martin, his executors, &c., and his and their agents, colliers, workmen, labourers, servants, and others by him or them lawfully authorized, from time to time and at all times during the term hereby appointed and granted, to open, search, dig, delve, bore, raise, and use all lawful ways and means whatsoever for the finding and discovering of all and any mines and minerals of coal and culm not already known, in or under and from the said several farms, lands, &c., or any parts or parcel thereof, and to use and work, the same, as well as the mines, veins, and seams of coal and culm which are already known, and to raise and land all the coal and culm which shall be found therein respectively, and for his and their own use and benefit to take, carry away, and dispose of all the coal and culm so to be raised and landed; and also free liberty, power, and authority to and for Martin, his executors, &c., and his and their agents, &c., to dig, sink, drive, run, and make any pits, shafts, levels, soughs, sluices, watercourses, railroads, and other roads, works, and contrivances in, over, under, or upon the said several farms and lands hereinbefore described, and to maintain and use the same; and also the like free liberty, licence, power, and authority to have and use a sufficient part of the said several farms and lands for laying and placing the coal and culm so to be raised and landed in the course of working the said mines, veins, and seams of coal and culm hereby demised, *and for laying and placing any other coal and culm;* and also to erect, build, set up, and maintain on any convenient part or parts of the same several farms and lands, any engines, erections, and machines for the better and more effectually working the said mines, *or any other mines,* and also such houses, hovels, and other buildings as may be found necessary or expedient for the use and accommodation of colliers, workmen, and labourers, and for the standing and placing of the horses, carriages, implements, and utensils which shall be found or

deemed necessary to be used in or about the working of the said mines, veins, and seams of coal and culm hereby demised, *or of or belonging to any other person;* and also the like full and free liberty, power, and authority for that purpose to raise, dig, take, carry, and use all or any of such coal and culm as may be in or upon the said several farms and lands, or any part thereof, and also to use, sell, and dispose thereof for the benefit of him the said Martin, his executors, &c.; and also to bring, lay, and place on the same several farms and lands all such timber, wood, iron, stone, bricks, lime, and other materials as he the said Martin, his executors, &c., or his or their agents, servants, or workmen shall or may want or have occasion to use or require in or about the erecting, building, or repairing of such engines, erections, and buildings as aforesaid; and also to do all and every such other acts, matters, and things whatsoever in, under, or upon the said several farms and lands, or any part thereof, as shall or may be deemed necessary or expedient in or about or for the pursuing or working of the said mines, veins, and seams of coal and culm hereby demised, *or of or belonging to any other person,* and raising and landing the same thereupon, and taking, converting, using, carrying away, and disposing of the same to and for the proper use and benefit of him, Martin, his executors, &c.; and likewise full and free ingress, egress, and regress to and for Martin, his executors, &c., and their agents, &c., customers and dealers, in and upon the said several farms and lands, with horses, carts, &c., to and for the getting, taking, and carrying away *the said coal and culm of or belonging to any other person as aforesaid,* making such reasonable satisfaction as hereinafter mentioned to the tenants or occupiers for the time being of the same several farms and lands for such trespass or damage as shall be occasioned therein respectively by reason of the liberties and privileges hereby granted, and using and pursuing the same respectively, To have and to hold, use, exercise, and enjoy the said mines, veins, and seams of coal and culm, and all and singular the liberties, licences, powers, and authorities and premises hereinbefore expressed and intended to be hereby appointed, granted and demised, unto Martin, his executors, &c., from the 25th of March last, for *twenty-one years* (and if the said Countess de Wuits has power and authority to appoint or

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demise the same, by the said power of leasing contained in the said will of the said Leonard Bilson Gwyn, for the term of *sixty years*, to commence or be computed from the said 25th of March last); and to have and to hold, use, and enjoy all and every the coal and culm that shall be found, gotten, or raised during the said term of *twenty-one years*, or the said term of *sixty years*, as the case may be, in or under all or any part of the said several farms and lands, unto and by Martin, his executors, &c., to his and their own use and benefit, and as and for his and their own proper goods and chattels,"—Yielding and paying therefor the net yearly rent or sum of 40*l.* by half-yearly payments, and the rent or royalty of 4*s.* for each and every wey of coal and culm over and above and beyond the first 200 weys to be raised, gotten, and sold or disposed of from the whole or solid coal under or out of the several farms and lands, and 3*s.* for every such wey to be raised, gotten, and sold or disposed of from any pillars of coal not being whole or solid coal,—each wey to consist of 11 tons of 20 cwt., each cwt. to consist of 120 lbs.

Then followed covenants by Martin, his executors, &c., for payment of the rent and royalties to the lessor and her assigns and the person or persons who should, by virtue of the will of the said L. B. Gwyn, deceased, be entitled to or be in the actual possession of the estate, successively; to work the coal and culm in a proper and workmanlike manner; to pay to the occupiers of the lands for the time being satisfaction for the trespass or actual damage done thereon by the working of the mines, &c., or by means of the liberties or privileges incident thereto; not to do wilful damage or injury to any of the messuages, &c., and, in case of damage, to repair the same; to erect and keep a weighing-machine, and to keep books, &c.; with a proviso for determining the lease by the lessee on giving twelve calendar months' notice; and a covenant to carry away the engines and materials at the expiration of the term. The lease also contained the following proviso: "That he, the said Martin, his executors, &c., shall have the right to use all the water flowing in, under, or over the said several lands and premises, to convey and divert *any other water from other lands and premises* in, under, or over the same, and for that purpose to make or form sluices, ponds, and watercourses as occasion shall be

and require, rendering therefor satisfaction for any trespass or damage to be occasioned thereby, &c.; and also to make and maintain and use, as well such railways and other ways and roads and watercourses, drains, ponds, and sluices in, under, and through, upon, or over the said several farms, lands, grounds, and premises as he, the said Martin, his executors, &c., shall think necessary and expedient for the carrying and conveying any of the coal and culm which shall be raised and landed from or out of the said mines, veins, and seams of coal and culm hereby demised, as also from any other mines, veins, or seams of coal, culm, and other minerals which shall or may be worked by Martin, his executors, &c., he and they rendering satisfaction for the damage to be thereby committed," &c. Then followed a power of distress for the rent and royalties, and a covenant for quiet enjoyment as against the lessor, or any other person or persons lawfully claiming by, from, through, or under or in trust for her or them, or by or through her or their neglect, default, privity, or procurement.

Shortly after the making of this lease, viz. in 1840, the lessor, the tenant for life, died. The prior remainders had failed, and the heir of the remainder-man, Thomas Powell, was a ward of the court of Chancery, and came of age on the 9th of February, 1846. Down to that time the rent and royalties reserved by the lease had been received by the receiver appointed by the Court, and these were paid over to the remainder-man by the receiver on the 14th of February. No rent had been accepted by the remainder-man, or by any one on his behalf, since that period. The lease (assuming it to be a twenty-one years lease) having expired in 1861, the plaintiff, who claimed under the remainder-man, brought ejectment for the mines, &c., against the defendant, who was assignee of the lessee.

The cause came on for trial before Blackburn, J., at the last Glamorganshire Spring Assizes, when the above facts were given in evidence. For the plaintiff it was insisted that the will of 1798 gave the tenant for life a mere power to *work* the mines, but not a power to *lease* them; and that, assuming it gave her power to lease, that power was not well executed by the lease of 1840, the covenants contained therein not being ordinary or reasonable covenants, regard being had to the nature of the property and to

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the practice of conveyancers at the date of the will. For the defendant it was submitted that the tenant for life had, under the terms of the will, power to lease the mines and minerals, and that she had well exercised her power by the lease in question; and, further, that the receipt of rent, at all events, created a tenancy from year to year, which had not been determined.

The learned judge ruled that the receipt of rent by the receiver appointed by the court of Chancery did not create a tenancy from year to year; and (without expressing any opinion upon the point of law) he offered to leave it to the jury to say whether, as matter of fact, any of the covenants contained in the lease were other than "usual, ordinary, and reasonable" covenants. This the plaintiff's counsel declined; consequently, as the learned judge reported, it was to be assumed that the jury had found that in the negative; and a verdict was accordingly entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, if the court should be of opinion either that the will conferred no power on the tenant for life to lease the mines, or that the power, if it existed, had not been well executed in point of law.

Joshua Williams, Q.C., in Easter Term last, obtained a rule nisi, on the grounds "that there was no power in the will of L. B. Gwyn to grant mining leases; that, if there were any power, the lease contained provisions not warranted by such power, and was void and of no effect; and that there was no evidence of a tenancy from year to year." He referred to *Chetham* v. *Williamson*, (1) and *Norway* v. *Rowe*, (2) to shew that at the time in question the usual practice of conveyancers was not to insert powers to grant leases of the mines and minerals, but merely licences to enter and work them,—the mining lease being a much more modern invention. And he submitted that the whole scope of the will shewed an evident intention on the part of the testator to confine the power of leasing to the surface, the power as to the mines being a mere working power, or, at most, a power to grant leases to continue for the life of the tenant for life; and that the covenants in this lease were far too large and unreasonable to be a valid exercise of the power, if any existed. He also cited the judgment of Bailey, J.,

(1) 4 East, 469. (2) 19 Ves. 143, 158.

in *The Earl of Cardigan* v. *Armitage*, (1) and the case of *Dayrell* v. *Hoare*. (2)

The Attorney-General, Grove, Q.C., H. S. Giffard, Q.C., and *G. B. Hughes*, in Trinity Term, shewed cause. They contended that it would be contrary to the whole scope and object of the will to limit it in the way suggested on the part of the plaintiff; and that the power of leasing the mines was not a power granted to the tenant for life for her own benefit, but one which cast upon her a fiduciary duty, to be exercised for the general benefit of the inheritance; the manifest intention of the testator being, that the mines should be worked by her in the only way in which she could work them, viz. by granting leases of the minerals. As to the general doctrine of powers, and the inclination of the courts to construe them liberally, they referred to the following authorities: *Hele* v. *Greene*; (3) *Berry* v. *White*; (4) *Attorney-General* v. *Moses*; (5) *Attorney-General* v. *Wray*; (6) *Shannon* v. *Bradstreet*; (7) *Muskerry* v. *Chinnery* (8); in error, *Sheehy* v. *Lord Muskerry*; (9) *Doe* d. *Simpson* v. *White*; (10) *Doe* d. *Keen* v. *Walbank*; (11) *Ackland* v. *Lutley*; (12) *Ackland* v. *Pring*; (13) *Campbell* v. *Leach*; (14) *Sugden on Powers*, 8th edit. pp. 549, 712. Then, as to the manner of exercising the power, they contended that anything that was usual and proper and reasonable (which the provisions in the lease in question must be assumed to be) in mining leases, regard being had to the course of mining in the particular country, and to the circumstances surrounding the property, was authorized by this power, there being no words to narrow or restrain it; and that, even though some of the liberties granted by the lease might be in excess, the lease would not thereby be vitiated: *Sugden on Powers*, 519. Lastly, they contended that, assuming the lease to be void, the receipt of the rent by the

(1) 2 B. & C. 197, 211; 3 D. & R. 414.

(2) 12 Ad. & E. 356; 4 Per. & Dav. 114.

(3) 2 Roll. Abr. 261, *Powers* (A), pl. 10; Vin. Abr. *Powers* (A), pl. 10; Sty. 258, 275, 315.

(4) Bridgm. 82, 90.

(5) 2 Madd. 294.

(6) Jac. 307.

(7) 1 Sch. & Lef. 61.

(8) 1 Ll. & G. 185.

(9) 1 H. L. C. 576.

(10) 5 East, 162.

(11) 2 B. & Ad. 554.

(12) 9 Ad. & E. 879; 1 Per. & Dav. 636.

(13) 2 M. & G. 937; 3 Scott, N. R. 297.

(14) Amb. 740.

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remainder-man from the hands of the receiver, after the former had attained his majority, being a ratification by him of acts done in his name and for his benefit during his minority, afforded evidence of a tenancy from year to year; and they referred to *Bac. Abr. Leases and Terms for Years* (I.) 9, as an authority to shew that even a lease granted by a receiver during the infancy of a ward would bind the infant at majority, at all events unless he repudiated it on becoming of full age. And, in answer to the suggestion that the precedents of the period of the will, in (1798) did not warrant a mining lease with such covenants and provisoes as in the lease in question, they referred to 3 *Wood's Conveyancing*, p. 343 (published in 1793), and 2 *Newnam's Conveyancing*, p. 134 (published in 1788), and to two private acts of parliament passed in the session of 1796, in all of which were to be found provisions almost identical in terms with those of the present lease.

Joshua Williams, Q.C., H. G. Allen, Griffits, and *C. E. Coleridge*, in support of the rule, argued as follows:—As to indefinite power of leasing, the principles are few and simple. The case cited from *Rolle's Abridgment, Powers* (A), pl. 10, affords a good illustration. If I grant a man an estate with a restriction against alienation, and a power to grant leases, could it be contended that the power of leasing was not restricted to the extent of the estate granted? Taking into consideration the provision against alienation, and that the daughter was tenant for life, "without impeachment of waste, except as thereinafter mentioned," it is manifest that the power granted to her to work or to authorize the working of the mines could not extend beyond her life. A general power to let and set is not to be construed as authorizing a lease to an unlimited extent: *Pigot* v. *Garnish.* (1) The cases as to building and agricultural leases are wholly beside this. Such powers, no doubt, are to be construed favourably. If the life of the daughter is not the limit of the power to lease, then the only limit pointed at is twenty-one years: *Pearse* v. *Baron.* (2) There are numerous authorities to shew that, where a lease professing to be made under a power includes matters which are not authorized by the power, the lease is void altogether: *Doe* d. *Bartlett* v. *Rendle*; (3)

(1) Cro. Eliz. 678. (2) Jac. 158.

(3) 3 M. & S. 99.

Doe d. *Lord Egremont* v. *Stephens*; (1) *Doe* d. *Williams* v. *Matthews*; (2) *Doe* d. *Griffiths* v. *Lloyd*. (3)

[BYLES, J. *Dayrell* v. *Hoare* (4) is very like this case in one respect. It was a demise of corporeal and incorporeal hereditaments at one entire rent.]

That case is explained in *Sugden on Powers*, 8th ed. 736. The present lease is objectionable in many respects. The liberty of stacking coal and culm on the lands is not confined to coals gotten from the mines demised, but extends to *any coals* brought, it may be, from Newcastle. Then, the power to erect engines and machinery, and houses for workmen, is expressly extended to the working of *any other mines*. The provisions as to watercourses and as to wayleaves also are too extensive. If any part is unreasonable, the lease is void altogether. The reservation of the rent and royalties is in consideration of all the premises, including the objectionable powers and privileges professed to be thereby granted. The circumstance that the jury must be taken to have found the covenants and provisoes in the lease to be "usual, ordinary, and reasonable," is wholly immaterial; the only question is, whether they can be sustained in point of law; and, besides, the finding would amount to no more than that they are usual and reasonable covenants as between landlord and tenant, whereas here the question is, whether they are reasonable as between the tenant for life and remainder-man. Then, there was no evidence of a tenancy from year to year. The receiver, during the minority of the remainder-man, had no authority to create a tenancy so as to bind him. If he might bind the remainder-man for a year, he might equally bind him for a thousand years. And nothing has been done by the remainder-man, since he attained his majority, to create the relation of landlord and tenant.

[ERLE, C.J., intimated that the Court were agreed as to that.]

The following authorities were also referred to:—*Broadbent* v. *Wilks*; (5) *The Earl of Cardigan* v. *Montague*; (6) *The Earl of*

(1) 6 Q. B. 208.
(2) 5 B. & Ad. 298.
(3) 3 Esp. 78.
(4) 12 Ad. & E. 356; 4 Per. & Dav. 114.
(5) Willes, 360.
(6) Sug. Pow. App.; 918.

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Cardigan v. *Armitage*; (1) *Heardson* v. *Williamson*; (2) *The Earl of Rosse* v. *Wainman*; (3) *The Durham and Sunderland Railway Company* v. *Walker*; (4) *Darvill* v. *Roper*; (5) *Micklethwait* v. *Winter*; (6) *Ricketts* v. *Bell*; (7) *Morris* v. *The Rhydydefed Colliery Company*; (8) *Bowser* v. *Maclean*; (9) *Bell* v. *Wilson*; (10) *Proud* v. *Bates*; (11) 2 *Jarman on Wills*, 3rd ed. 274; *Sugden on Powers*, 8th ed. 722, 736; *Lewin on Trusts*, 4th ed. 84, 95; *Bainbridge on Mines*, 278, 279, 282; and *Rogers on Mines*, 309. The argument was summed up thus:—1. That the power in question was merely a working power, authorizing the tenant for life to work the mines herself, or to license others to work them, but not to lease them. 2. That, if the will gave her a power of leasing the mines and minerals, it must be confined to leases to endure for her own lifetime only. 3. That, at all events, there was upon the face of the whole will a sufficient indication of intention on the part of the testator, that the leases to be granted should in no case exceed the term of twenty-one years, or contain covenants and provisions which were unreasonable in point of law. As to the form of mining leases in general, reference was made to *Bythewood's Conveyancing*, vol. iv. p. 711; *Doe* d. *The Earl of Jersey* v. *Smith*; (12) and to the statutes 19 & 20 Vict. 120, and 21 & 22 Vict. c. 77. (13)

Cur. adv. vult.

Nov. 25.—The Court not being agreed, the following judgments were delivered:—

BYLES, J. It is important, in considering this case, to bear in mind that the tenant for life, the testator's daughter, is by the

(1) 2 B. & C. 197; 3 D. & R. 414.
(2) 1 Keen, 33.
(3) 14 M. & W. 859.
(4) 2 Q. B. 940; 2 G. & D. 326.
(5) 3 Drew. 294.
(6) 6 Ex. 644.
(7) 1 De G. & S. 335.
(8) 3 H. & N. 885.
(9) 2 De G. F. & J. 415.
(10) 11 Jur. (N. S.) 437.
(11) 11 Jur. (N. S.) 441.
(12) 1 B. & B. 97, 3 J. B. Moore, 339; (in error) 2 B. & B. 473, 5 J. B. Moore, 332.
(13) A few days after the argument, Mr. Williams (with the assent of the counsel on the other side) handed to the court the following additional authorities:—Gardiner *v.* Williamson, 2 B. & Ad. 336; Neale *v.* Mackenzie, 1 M. & W. 747; Bird *v.* Higginson, 2 Ad. & E. 696; 4 Nev. & M. 505; affirmed on error, 6 Ad. & E. 824.

will made not entirely unimpeachable of waste, but only partially so, that is to say, subject to certain restrictions thereinafter to be mentioned. Those restrictions on the power to commit waste seem to relate to the timber and the minerals; for, restrictions follow as to both timber and minerals, and as to nothing else. The timber the tenant for life is not to cut during the first twenty years, under certain penalties, which, if incurred, are to be paid to the next reversioner. The minerals the tenant for life has power to get, but subject to the restriction that all the issues, net proceeds, and profits thereof are to be applied by the same tenant for life, first, to the payment of the testator's remaining debts, and afterwards to the purchase of land for the benefit of the successive future owners of the testator's estate.

There is a general leasing power of the surface, introduced by usual and formal words, enabling the tenant for life and the successive tenants in tail respectively to lease the surface for twenty-one years; but every such lease is to contain a special reservation enabling the tenant for life in her time, and the successive remainder-men and reversioners in their time, to search for and work the coal and minerals. Then follow restraining clauses as to the timber and the minerals, which have been before adverted to.

The question arises on the construction of the clause empowering the tenant for life to deal with the minerals. So much of it as is material to the present inquiry is in these words:—"It shall and may be lawful for *my said daughter to work, or contract for, lease, or let out to be worked or wrought*, all the coal, culm, lime-rock, and all iron-stone, lead, copper, and tin mines, or any other ore, mines, and minerals whatsoever, which are already known and discovered, or which may hereafter be found out and discovered, and that all the issues, net proceeds, and profits arising therefrom, shall be paid over *by my said daughter* to my trustees, and by them applied in payment of my debts; and, after payment of the whole thereof, that *my said daughter* should, with the consent of my trustees, lay out the same in the purchase of estates, to be settled and subject to the trusts and limitations of my will."

The plaintiff contends that this provision has reference to the restrictions upon the right of the tenant for life to commit waste, referred to in the earlier part of the will, and is a mere working

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power over the minerals, given to the daughter, the tenant for life, accompanied with restrictions as to the disposition of the proceeds, compelling her, after payment of the testator's debts, to capitalise the issues and profits for the benefit of those in remainder.

The defendants contend that it is a leasing power enabling the daughter to grant leases of the minerals, extending beyond the term of her own life, without any limit to the duration of those leases.

I am of opinion that the plaintiff's construction is the true one.

1. It will be observed that there are no formal words introducing the power, as in the power to lease the surface. On the contrary, the word "lease" occurs after the words "work" or "contract for," and is followed by the words "or let (1) out to be worked."

This is a case in which the maxim "*noscitur a sociis*" applies: see *Sanderson* v. *Dobson*. (2) The expressions may be careless; but, construing the word "lease" by what precedes it, and by what follows it, that word seems at the utmost to import no more than this,—that, as the daughter may in her own time work the minerals, or make contracts for working them, so she may also during her own time lease them for that purpose. But it may admit of very serious doubt whether a lease of any corporeal hereditament is intended, not only because of the words associated with the word "lease," but because (as will presently be seen) no rent appears to have been contemplated. Now, as rent cannot issue out of an incorporeal hereditament, but any periodical sums made payable by an instrument under seal in the form of a lease thereof for a term certain are not rent, but sums in gross, properly described as "issues, proceeds, and profits," such a lease would satisfy the use of the word, and should seem to be all that was intended.

2. It seems to me plain that the interest to be created, whatever it be, does not extend beyond the daughter's life. The daughter alone is mentioned in this clause, and she is three times mentioned. First, she is the person to work or contract for, lease, or let out to be worked. Secondly, *she*, and not the remainder-men, is to pay over the issues, net proceeds, and profits, to the trustees. And

(1) Throughout this judgment, this word was assumed to be "set," but in the office copy of the will produced it was "let."

(2) 1 Ex. 141.

it is to be observed, that, although here, as elsewhere, the will is very profuse in the use of words, yet, among the words "issues, net proceeds, and profits," the word "rents" is not to be found. Thirdly, *she*, and not the remainder-man, is, after payment of debts, to lay out the issues, net proceeds, and profits, in land, to be settled for the benefit of herself and her successors in estate.

3. If the power be held to enable the daughter to make leases beyond her own life, there is no limit to those leases. She may make a lease for 1000 years, and may take any amount of fine or premium. It is true this power is but a fiduciary power in the donee thereof, the tenant for life; but then there is no reason to lean to a construction in favour of the donee, on the ground of any supposed preference shewn by the testator to his own daughter, for she would derive no benefit from the extension of the lease to a term beyond her own life.

4. A long lease of the minerals by the tenant for life is inconsistent with the express special reservation which a lease of the surface, under the formal leasing power, is, by the directions of the will, to contain. Every such lease is to reserve a power for each successive owner of the estate to search for and work the minerals. But, if the tenant for life have already leased the minerals for a long term of years, then such a reservation in favour of the remainder-men during the existence of that term is vain; and it is to be observed that the reservation of the power of the remainder-men to get the minerals is not fiduciary, but beneficial.

5. No case has been cited at the bar in which expressions so vague have been held to impower a tenant for life to grant long leases. The Attorney-General referred us to *Lord Muskerry's Case*; (1) but there the power was express to grant leases for any term of life or years, and to take any fine.

6. There is, so far as appears, no necessity for the daughter to grant a term of years in the minerals extending beyond her own time, and therefore no necessity to strain the words so as to make them confer a power to lease the minerals for a term beyond her own life. If it be objected that the word "lease," if confined to her own time, has no operation, because, as tenant for life without impeachment of waste, she might already lease for her own time,

(1) 1 H. L. C. 576.

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the answer is twofold. First, the same objection applies to all the words in juxta-position with the word "lease," such as "work," "contract for," and "let out to be worked;" for, all this, she, as such tenant for life, might do without any power at all. The second answer is, that all these words are, as already observed, introductory to a restriction on the power of dealing with the proceeds, which proceeds are to be employed by her in the payment of debts, and the residue is to be capitalised.

An observation, perhaps not altogether undeserving of attention, arises on the word *debts*. The debts, in ordinary course, would be more likely to be payable and paid in the daughter's time, than in the time of her successors in estate, immediately or remote; especially if it be remembered that the debts are only debts which may possibly remain after the exhaustion of a prior fund appropriated to their discharge.

The true meaning of the will seems to me to be shortly this:— The tenant for life may get the minerals in her own time, or the value of them, in any way she pleases, but *she* must dispose of the proceeds in the way the testator prescribes.

For these reasons I think the lease in question is void, and that the plaintiffs are entitled to recover.

Whatever may be the consequences, I cannot avoid this conclusion. I trust, however, that it will be attended with no injustice; for, on reference to the "habendum" of the lease, it is plain that both lessor and lessee were aware of difficulties attending such a construction of the power as would support a lease for sixty years.

But the plaintiff also contended, that, assuming the tenant for life to have had a general leasing power, that power would have authorized only a lease with usual and reasonable provisions as between tenant for life and remainder-man, and that the present lease contains some provisions very unreasonable and injurious to those in remainder. It is not necessary, in the view I take, to discuss these objections: I would only venture to make two observations. First, that, whatever the value of the objections, they do not seem to be much affected by the verdict of the jury, who have, as I understand, found the provisions usual and reasonable as between landlord and tenant, but have given no verdict on the

propriety of these provisions as between tenant for life and remainder-man. Secondly, assuming any one or more of the objections to the provisions of the lease to be well founded, there is great difficulty in holding the lease good in part and bad in part, one entire rent being reserved for the whole.

I am desired by my Brother Montague Smith to say that he agrees in this judgment, and generally in the reasons for it.

ERLE, C.J. Upon this rule for setting aside the verdict for the defendant and entering it for the plaintiff, the question was whether the lease under which the defendant claimed was valid.

The lease, being a lease of mines, was granted by the devisee for life of the estate of Leonard Gwyn; and, as the devisee was dead, the real question was, whether in the will there was a power enabling the devisee to grant this lease.

The plaintiff contended,—first, that the will created no power for granting leases of mines,—and, secondly, if there was such a power, that the lease in question was not a valid exercise of that power.

Upon the first question, whether the testator created any power for the devisee for life to grant leases of mines, the material clause of the will relating thereto is in these words:—"It is my will and desire that it shall and may be lawful for my said daughter to work, or contract for, lease, or let out to be worked or wrought, all the coal, culm, lime-rock, and all iron-stone, lead, copper, and tin mines, or any other ore, mines, and minerals whatsoever which are already known and discovered, or which may be hereafter found out and discovered, in or under any such parts of my real estate as are not herein specifically devised."

If the words relating to the leases of mines are taken, omitting supplemental words, the clause would run thus:—"It is my will that it shall be lawful for my daughter to contract for, lease, or let out to be worked, all mines under any part of my real estate;" and if the clause had been so worded it seems clear that an unconditional power to lease mines for an undefined space of time would have been granted thereby.

Now, the supplemental words increase without taking away any of the operative force of the words of grant above selected. The

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expression "it is my will," is not altered by the addition of the words "and my desire:" and the effect of the expression "to contract for, lease, or let out to be worked," is not altered by the addition of the words "to work" placed before them. Although it is not clear what the testator meant by granting a power to work mines to a devisee for life without impeachment of waste; still, whatever he meant, it seems illogical to affirm that the grant of a power to lease mines is annulled, because a grant of a power to work mines, in the same sentence, may possibly be surplusage, operating nothing.

As the addition of supplemental words does not affect the meaning of the operative words above selected, so the omission of words either limiting the power of leasing in respect of time, or imposing any condition on the exercise thereof, does not annul the grant of a power without such limit or condition. If the expression had been, "It is my will that it should be lawful for the devisee for life to lease the mines for sixty years, provided the best rent be reserved," the power would be created, and limited to sixty years, and conditioned in respect to rent; but, if the limit and the condition are struck out, the power remains unconditional and without limit. If the clause be taken by itself, and construed without reference to the context of the will, it contains a clear grant of a power to lease, unlimited in time, and unconditioned: and the defendant would have a right to demand that effect should be given to that clause according to the meaning of the words, taken in the ordinary sense.

Furthermore, if the clause in question is construed by reference to the context, the context confirms the above-mentioned construction of the clause. The context shews the state of the testator's family, the nature of his property, and the governing purpose of his mind in making the will.

As to the state of his family,—his daughter was his only child. As to the nature of his property,—he had lands in several parishes in a mining country. As to the governing purpose in making the will,—he desired to give to his daughter and her descendants enjoyment of all the property of which he should die possessed, in as ample a manner as was consistent with securing that enjoyment from being abstracted from her by any husband she might take.

With this governing purpose in relation to the whole of his property, he had the subordinate purpose, in relation to the minerals under his property, that they should be raised and turned into money, and the money invested in the purchase of additional lands, to pass in the same line as the lands which were the subject of devise.

The will gives the property to the daughter for life, without impeachment of waste, subject to an exception which in my view is not material; remainder to her sons in tail; remainder to her daughters in tail; remainder to one of three relations, to be named by the daughter, in tail; remainder to the right heirs of the testator. Then follows the clause against assigning any part of her life-estate at the request of her husband, or assigning any part of the rents during her life-estate to any person; in which case her life-estate is to vest in the trustees, and they are to pay the rents to her separate use.

Then follow the clauses granting powers to her as devisee for life:—First, a power to make a charge in favour of the husband, on certain conditions. The form of the grant of this power is, "I do will and direct that my daughter shall have full power to make such charge," &c. Secondly, the power to raise portions for younger children. The form of this grant is, "I do will and direct, and do hereby expressly authorize my daughter to charge such portions," &c. Thirdly, a power to grant leases. This portion of the will comprises leases of two kinds,—leases of land without the minerals, and leases of the minerals; which may be described as leases of the surface, and leases of the mines; and, as it contains the clause on which the decision is to turn, it requires close attention. The form of the grant of the power to make leases of the surface, is, "I do impower, and it is my will and meaning, that my daughter, and all who shall be possessed of my real estates under my will, may, and I do hereby impower them respectively to grant leases of any parts of my real estates for the term of twenty-one years and no more, reserving the best rent, payable half-yearly, to the possessor of the reversion for the time," and "provided the leases commence in possession, and the tenant be restricted from waste and from assigning without licence, and that a special reservation be made impowering my daughter during

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her life, and her successors when in possession, and their assigns, labourers, and workmen, to search for, dig, delve, land, work, take, and carry away any minerals whatsoever." This is the clause relating to leases of the surface. The clause does not extend to leases of the minerals, both because such leases are afterwards expressly provided for, and because the clause reserving a right to the lessors and their assigns to search for and take minerals is inconsistent with a lease of the minerals to the lessee. The right to search for and take minerals must be reserved to the lessors and their assigns: and, by the use of the word "assigns" here, as far as regards the daughter, the testator may have intended, and probably meant, to include lessees of the mines taking under the daughter by virtue of the clause creating a power for her to lease mines, hereafter to be considered. After the clause creating a power to lease the surface follows a clause relating to the preservation of the timber for twenty years. This clause is parenthetical in its nature. It does not cohere with what precedes it: and the context seems to suggest that the will was originally drawn with the clause granting power to lease the mines, in immediate sequence to the clause granting power to lease the surface, and that the parenthesis relating to the timber was afterwards inserted: for, the clause relating to the timber begins thus,—"or for the purpose of cutting down or grubbing up any wood or underwood." This clause does not cohere grammatically with the preceding clause, that is to say, the reservation must impower the daughter and her successors, and their assigns, to search for, "dig, and carry away minerals." Then, the words "or for the purpose of cutting down timber" are insensible, as she may have the purpose without the aid of the power. The meaning probably was, "or to enter on the land for the purpose of cutting timber." Be that as it may, the ideas seem also incoherent; for, the reservation of the power of entering to cut timber is followed by strictly prohibiting any possessor of the estate from cutting any timber whatever, under a penalty of 10*l.*, or any wood whatever, under a penalty of 40*l.*, except for necessary purposes, until twenty years after the death of the testator shall have elapsed.

The reservation of a power to cut timber for profit on the lands leased for twenty-one years could have operation only during a

fraction of a year, if the lease was made shortly before the tenant for life died: and, as the lease under the power must be in possession, and not in reversion, the probability would be that it would never come into operation at all.

Still, whatever be the history of the timber clause, it is utterly without connection in sense with the clause relating to leases of the surface, which precedes it, and the clause relating to leases of the minerals, which follows it; and, those two last-mentioned clauses, being cognate in matter, ought to be read and construed as if the timber parenthesis did not exist. Then the will would run thus,—first, the clause creating a power for making leases of the surface, reserving a right to the tenant for life, and her successors, and their assigns, to search for, &c., and take, &c., the minerals, as above set out,—then, secondly, the clause creating a power to lease the minerals, which is in the form above set out; the words "It is my will and desire that it shall be lawful for my daughter to let out to be worked all the minerals," are clearly sufficient in point of form to create a power to lease the mines; and, though it is not the form used before, yet for each power the testator creates it by a different form.

The context makes the intention of the testator to create a power for leasing mines more clear, if the clause reserving a right to the daughter and her assigns to mine, in the leases of the surface, be read with the clause relating to the power for leasing the mines. When the testator is creating the power to lease the surface, he declares his will that such leases of the surface shall be subordinate to the mining operations which he contemplated. And he afterwards declares what those mining operations were,—that is to say, either works by the daughter herself or by persons holding contracts for the lease or leases of the mines under her. The right reserved to the daughter and her assigns to mine during the twenty-one years of the lease of the surface, might operate after the death of the daughter; then the power of leasing the mines to be worked was probably intended to be an exercise of the right so reserved; and the daughter could not impower her assigns to mine after her death, unless she had a power to make leases of the mines, which would continue in force after her death, that is, unless a power to lease was created and given to her.

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The power for granting leases of the surface is given to the tenant for life and the tenants in tail; the power relating to the minerals is given only to the daughter, the tenant for life, and her assigns. It seems to me to follow that the testator contemplated the mines would be worked, and profits realized therefrom, both in the daughter's life-time and after her death; and it may be that a lease of the mines would be the only prudent course for obtaining such profit. The clause creating such power over the mines is a power to work and to let; and it is argued for the plaintiff, as the power to work is inoperative for a tenant for life without impeachment for waste, that therefore the testator intended that the power to let should be inoperative also. This consequence by no means follows from the premises. If it should be conceded that the power to work is inoperative, still the power to let may take effect, and ought to be held valid. Moreover, it may be that the testator had a meaning in uniting the power to let with the power to work the mines, and that he so united them on account of the clause for securing the proceeds of the minerals for investment in land, which clause comprises as well the proceeds of works by the daughter in her life-time as of the works by her lessee after her death; and so there might be a reason for bringing the proceeds from each of these sources into one category, viz. that all should be paid over to the trustees. Also, it may be that the testator expressed a desire that the daughter should work the mines, knowing that without some works the value of the minerals could not be known, and a contract for a lease of mines could not be properly made without that knowledge.

I now come to the consideration of the clause for securing the proceeds of the minerals to be so paid over. It directs that all the issues and net proceeds and profits arising therefrom (that is, from works by the daughter and from works by her assigns) "shall from time to time as they arise be paid over by my said daughter to my trustees, and be by them applied in purchase of real estates;" and five parishes or places are named in which such real estates are to be situate; and the rents of such estates are to be enjoyed by the daughter and the tenants in remainder successively. This clause is of considerable importance in construing this will. By its operation the daughter,

either in working the mines, or letting them out to be worked, was enabled to act only in a fiduciary capacity, without being able to promote her own interest at the expense of those in remainder. The more profit she could obtain from the minerals, the larger would be the estates to be purchased, of which she would have the rents for life only, and after her they would go to the tenants in remainder. If she disposed of the minerals by pretended leases, contrary to the intention expressed in the will, out of favour or ill-will, they might be impeached in equity for fraud, or she might make herself responsible for a breach of her fiduciary duty. But no such question is raised by the facts of this case.

This clause making the interest of the daughter fiduciary only also explains the absence of those provisions imposing conditions on the exercise of the power, which were inserted in the clause creating the power to lease the surface. It would be the interest of the donee of such a power to make the most profit that could be got from the minerals; and all the profit so obtained would be for the benefit of the tenants in remainder as well as herself. This clause also explains the absence of any limit in respect of time for the duration of the leases of the minerals so to be made by the tenant for life; any duration which would be granted by a prudent owner of the fee, in accordance with the usual course of skilful mining, would be most in accordance with the apparent intention of the testator in creating the power; because, under such a lease, the largest profit would probably be obtained. Capital, skill, and labour are, for the most part, essential for obtaining profit from mining operations; and the duration of the lease in ordinary course is in proportion to the amount of capital to be invested, and the quantity of minerals to be raised. The probability of the intention to create a power for leasing mines, without limit for the duration of the leases, and without condition for the exercise of that power, appears greater if the character of the donee of the power and the nature of the property subjected to the exercise thereof are considered. The donee of the power was the only child, and the real object of the bounty of the testator. The testator, from his affectionate interest in her, probably placed confidence in her discretion, and therefore left the duration of the leases entirely to

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that discretion. The will indicates that the testator did not take any special interest in the tenant in tail in remainder, who was to succeed if she had no children, because he leaves it to her to choose which of three persons named by him should in that event succeed. The nature of the property subjected to the exercise of the power confirms the probability of an intention to leave the exercise of the power without limit or condition. The nature of the property was mineral. The lease before us is a lease of the coal; and it is probable that coal was the mineral chiefly within the contemplation of the testator, who would be supposed to understand what his property was. If the dimensions of a seam of coal are known, both the capital required for working the mine, and the time required for raising all the coal that can be profitably raised from a seam, can be calculated; then, if such a lease is granted as would induce a miner to invest the requisite capital, the lease of the seam of coal is in effect a sale of all the coal in the seam, at the price to be paid under the name of royalty for the quantity raised; and, if this royalty be a fair amount for the landlord, the coal is properly sold. Beyond the royalty, a money rent is also usually reserved. This money rent is some security that the mine will be worked, as it is a dead loss if no coal is raised; it is also some security that the duration of the lease will be limited to the time in which all the coal will be raised, because, after the coal is exhausted, the money rent is again a dead loss. The testator expresses a purpose that the minerals should be sold for investment in other land. Such a lease of the coal as would enable the lessee to raise all the coal in the seam, would effect that purpose. In this sense, the nature of the property makes a limit for the duration of the lease unnecessary, and makes any condition for the protection of the tenant in remainder also unnecessary. No protection is wanted, if the donee of the power acts with sound discretion in the performance of her fiduciary duty.

For these reasons, I come to the conclusion that the will created a power for granting leases of the mines, without any other limit for the duration of such leases, and any other condition for the exercise of the power, than is attached to and arises from the fiduciary capacity of the donee of the power.

The plaintiff has contended,—first, that no power to lease mines

was created,—and, secondly, that, if any power was created, it was subject to the same limit as to duration, and to the same conditions in the execution thereof, as are attached to the power for leasing the surface.

Either of these constructions could be supported, if the clause relating to the leases of the mines was altered in one of two ways, —that is, either if the words relating to leasing the mines were struck out of that clause, or the words imposing the limit of twenty-one years and the conditions for the benefit of the remainder-man contained in the clause relating to leases of the surface were inserted; that is to say, the construction could be maintained if the will was altered so as to suit the construction. But a construction which requires an alteration of the will cannot be supported, if effect can be given to the will as it stands; and here it is clear that effect *can* be so given to this will. Also, all arguments founded on the presumed improbability of the testator having intended what the words of the will clearly express, are to be peremptorily rejected, universally.

The argument derived from the use of the words "to work," before the words relating to leasing the mines, was pressed with more reliance on the part of the plaintiff. But to this argument I have already offered an answer which seems to me sufficient.

The testator clearly intended that the mines should be worked, and large profits made. The plaintiff suggests that he intended that these profits should be made by the daughter by works carried on by herself. But this suggestion would not be adopted by any one capable of comparing the advantages derived from leasing mines for a secure rent and royalty with the advantages derived from working those mines at the landlord's risk and with the landlord's capital. The words, taken literally, impower the daughter to work with her own hand; the notion that the testator intended the daughter to work with her own capital, is not more improbable than that he intended that she should work the mines with her own hand.

For these reasons, I come to the conclusion that the first question should be answered in the affirmative, viz. that the testator did create a power for the devisee for life to grant leases of the mines.

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Then the second question arises, whether the lease in question is a valid exercise of that power. By the lease, the devisee for life demised to one Martin "all the mines, veins, groves, beds, and seams of coal and culm, and quarries of stone whatsoever, already known and opened, or hereafter to be discovered and opened, under three farms in the parish of Llangavelack, viz. Pen Place, in the occupation of W. Rogers, Pentre Garrow, in the occupation of John Williams, and Cadley, in the occupation of W. Rees; with liberty to the lessee, his executors, &c.,—first, "to use all lawful means for finding any coal or culm, and raising it, and disposing of it." Secondly, "to make shafts, watercourses, and railroads, and to use a sufficient part of the said land for placing coal to be raised therefrom, *and also any other coal;* and to erect engines for working the said mines, *or any other mines;* and to build houses for the miners working the said demised mines, *or mines belonging to any other person;* and to bring building materials for erecting engines, &c.; and to do all such other acts in, under, or upon the said farms *as shall be deemed expedient in working the mines and seams of coal hereby demised*, or *belonging to any other person;* and to have ingress and egress for customers to carry away coal from the said mines, or *belonging to any other person;* making satisfaction to the tenants and occupiers for any damage occasioned by the liberties aforesaid,"—paying 40*l.* annual rent, and 4*s.* for every wey of coal or culm from solid coal, and 3*s.* for every wey from pillars of coal. Then the lessee covenants to pay rent and rates, and to work the mines in a workmanlike manner, and to pay satisfaction for damage to the occupiers, and compensation for the rent of any land taken. Then there are provisions for ascertaining the quantity of coal raised, and provisions relating to the removal of engines and using water, and a covenant for quiet enjoyment. The habendum is for twenty-one years, or sixty years if the power authorizes a lease for sixty years.

This being the lease, the question whether it is a valid exercise of the power of leasing created by the testator depends upon the extent of that power; and, if my construction of the will be correct, the power is without limit and without condition, to be exercised by the donee at her discretion, according to her fiduciary duty; and it follows that the lease is a valid exercise of that

power, so as to entitle the defendant in ejectment, claiming under that lease, to our judgment.

In the ejectment I consider the question to be, whether the term passed to the lessee. If yes, the defendant succeeds; and the question whether the lessor was guilty of a breach of fiduciary duty either in granting a lease upon such terms or with such licences as appear therein, is not relevant to the decision of the action of ejectment. If there was a breach of fiduciary duty towards the remainder-man, she or her representatives may be responsible to him for damages before a tribunal taking cognizance of breaches of fiduciary duty. If some of the licences are ultra vires, the lease may be void pro tanto, and valid for the residue. In ejectment, the question is, whether the term is vested in the lessee; and, if it was legally within the power created by the testator, the answer is in the affirmative, and the defendant succeeds.

If any question can be raised upon the effect of the provisions in the lease relating to the licences for working, in my opinion it would be a question of fact for the jury; and it has been disposed of by the jury in favour of the defendant, in the finding that all the provisions of this lease are usual according to the custom of the country, and reasonable for the purpose of working the mines in a workmanlike manner.

If the power was created according to the construction of the will contained in the answer to the first question above set forth, it is clear that a lease ought to contain all such provisions as are within that finding of the jury, in order to effect the testator's intention of turning his minerals into money.

The plaintiff argued that the licences to raise coal from the mines of other proprietors through works on the plaintiff's land, are unauthorized by the power, and therefore void. If the argument succeeded, those licences would be void, and the lease would stand. But the argument appears to me to fail; such licences *may be* reasonable and usual; and, if so, they would be authorized by the power. The lease comprises three farms. They may be small farms lying separately among farms of other proprietors; and the seam of coal may extend under parts of each of those farms; and the defendant, for the purpose of raising the coal in the seam may

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have similar leases from the proprietors of all the farms, and may have placed shafts and other works so as to work the seam most profitably as one entire seam, without more regard to the different ownerships of the surface than is required for ascertaining the amount of royalty due to each. In that state of things, it might be reasonable and usual for the shafts and other works to be placed where skill in mining shewed that most coal could be raised at the least cost. If the lessees had licence so to do, they could afford to pay a higher royalty, and so the profit of each landowner would be the greater. And the landowners' rights on the surface would not be sacrificed, because the miners are bound by the lease to make compensation both to the occupier of the surface and his landlord, for all damage and for all surface taken for stacking coal, or making spoil-heaps, or otherwise.

The plaintiff, contending that the lease was void, placed great reliance on the length of the term for sixty years. If a power to lease was created, the plaintiff contended that the testator must have intended to fix some limit; and, as none was expressed in respect of the term, that therefore the omission should be supplemented by taking the term of twenty-one years, the limit of the power for leasing the surface. But I have before stated what is my answer to this objection.

The question turns upon the intention of the testator, to be collected from the words of his will; and the judgment is to be founded upon a construction of those words. I cannot find that the construction of other wills can properly guide to the construction of this will, unless the terms and the context were similar. But no cases were cited where the wills to be construed bore any analogy to the will here in question. I have, therefore, abstained from referring to any of the cases so referred to and argued upon; and, in construing the will here in question, my judgment is for the defendant.

My Brother Willes desires me to say that he concurs in this judgment, and generally in the reasons I have given.

Rule discharged. (1)

(1) The Chief Justice intimated that Montague Smith, J., if it were necessary, for the purpose of carrying the matter to the Court of Appeal, would withdraw his assent to the judgment pronounced by Byles, J.

TWEED *v.* MILLS. 1865 *Nov.* 11.

Vendor and purchaser—Sale of Goodwill—Title.

A., being tenant from year to year of a public-house, agreed to let to B. "all his right, title, and interest" in the premises for 1000*l.*, and to assign over to him the beer and other licences, and to sell him the fixtures, stock, &c., at a valuation; and B. agreed to accept the house and premises, "having a good title to the licences," to pay a deposit of 100*l.*, and the balance on completion," &c. Proviso, that, if B. should not be accepted as a tenant by F. & H., the superior landlords, at a certain rent, and subject to the terms named in the margin (which were, "Messrs. F. & H. agree to grant B. a lease of thirty-five years, at 200*l.* rent," &c.) the deposit to be returned, and this agreement void:—

Held, that this agreement was not well declared on as a contract on the part of A., that F. & H. should grant B. a lease on the terms mentioned, and make a good title; it being in substance only an agreement for the sale by A. of his interest such as it was, with a proviso that the contract should be void if a valid lease from F. & H. could not be obtained.

THIS was an action upon an agreement for the sale of the goodwill of a public-house.

The first count of the declaration stated, that, by an agreement bearing date, &c., it was agreed by and between the plaintiff and the defendant that the defendant should let and assign all his right, title, and interest in and to a certain house and premises then in his possession, being a public-house known by the sign of the Windsor Castle, situate in Albany Street, Regent's Park, for 1000*l.*, and do all such other acts and things as were necessary to obtain a legal transfer thereof to the plaintiff upon the terms and conditions following, that is to say, that the plaintiff did thereby agree to accept the said house and premises, and pay the defendant the price above mentioned at the time mentioned: And the defendant further agreed to procure for the plaintiff from Messrs. Field & Hanbury a lease of the house for a term of thirty-five years, at a rent of 120*l.*: And the plaintiff agreed to accept the lease, and to pay the sum of 1600*l.* as a consideration for the same; and, as earnest of the said agreement, the plaintiff paid to the defendant 100*l.*: And it was further agreed by and between the plaintiff and the defendant, that the defendant should within a reasonable time in that behalf *make a good title to the said house* for the residue of the defendant's term in the said house, and to *make a good title for*

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Messrs. Field & Hanbury to such house and premises for the term of thirty-five years mentioned in the said agreement, within a reasonable time in that behalf: And it was further agreed, that, if the defendant should not fulfil the said agreement on his part, he should return the said sum of 100*l.*, in addition to the damages thereinafter mentioned; and if the defendant should neglect to perform or refuse to comply with any part of his said agreement, he should pay to the plaintiff on demand the sum of 300*l.*, thereby agreed between the plaintiff and the defendant to be the damages to be fixed on breach thereof: Averment of plaintiff's readiness and willingness to perform the agreement: Breach, that the defendant did not when requested, or at any time, furnish, adduce, or make a good title to the said house as aforesaid; by means of which premises the defendant had become liable to pay the plaintiff the said sums of 100*l.* and 300*l.*, in the agreement mentioned, when requested, &c., but that he neglected and refused to pay the said sums, or any part thereof.

The second count was substantially the same as the first.

The third count was for a fraudulent representation as to the defendant's right to carry on the business of a licensed victualler in the house in question: and the fourth was for money received for the plaintiff's use, and on accounts stated.

The defendant traversed all the material allegations in the first three counts, and on the last paid into court 10*l.* 6*s.* 9*d.* Issue, &c.

The cause was tried before Byles, J., at the sittings at Westminster, after the last term. The facts proved were in substance as follows:—The defendant being in possession as tenant from year to year of the Windsor Castle, under a lessee whose term was about to expire, proposed to sell his interest therein, together with the stock-in-trade and fixtures, to the plaintiff, and to procure from Messrs. Field & Hanbury, the owners of the reversion, a fresh lease. The parties accordingly met, with their respective brokers, to value the stock and fixtures, and to arrange the terms upon which the new lease was to be granted,—Messrs. Field & Hanbury being represented on the occasion by their brokers; and ultimately the following agreement was drawn up and signed by the plaintiff and defendant respectively, and the deposit of 100*l.* paid:—

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"Memorandum of agreement made and entered into this 27th of January, 1865, by and between Henry Mills, of the one part, and William Tweed, of the other part, in manner as follows:— First. He the said H. Mills doth hereby agree to let all his right, title, and interest of the house and premises now in his possession, known by the sign of the Windsor Castle, situate, &c., for the sum of 1000*l.* goodwill, and assign over good and sufficient beer and other licences on being paid for the time unexpired therein, and do all other acts and things as are necessary to obtain a legal transfer thereof to the said W. Tweed; also sell such part of the household furniture, fixtures, and effects now in his dwelling-house and premises which he may have a right to sell, at a fair appraisement to be made by Messrs. P. & J. Belton and Messrs. Warlters & Lovejoy, or their umpire, in the usual way; likewise the sound and saleable stock-in-trade, not exceeding four butts of porter, eighteen barrels of ale, wines, spirits, and compounds, not exceeding the value of 400*l.*, by gauge and valuation of two gaugers or their umpire, such appraisement, gauge, and time of delivering up possession of the premises (except such part as is underlet), shall be on or before the 16th of February next, at which time all rent, taxes, gas-light rent, and other outgoings, shall be cleared up. Secondly. He the said W. Tweed doth hereby agree to accept the said house and premises, having a good title to the licences, and pay unto the said H. Mills the price or sum above mentioned for the goodwill; also to buy the said household furniture, fixtures, and effects, at appraisement, with the stock-in-trade as aforesaid, and that such appraisement, gauge, and time of taking possession, shall be on or before the 16th of February, at which time the purchase-money shall be duly paid; one moiety of the whole expenses to be paid by each party: Provided the said W. Tweed is not accepted by Messrs. Field & Hanbury as a tenant at the annual rent of 120*l.*, and subject to the terms named in the margin [which were as follows:—'Messrs. Field & Hanbury agree to grant to Mr. Tweed a lease of thirty-five years, at 200*l.* rent and 80*l.* allowance on dealing with them,—the premium for which is to be 1600*l.*'], the deposit to be returned, and this agreement void; and, as earnest of this agreement, the said W. Tweed has paid into the hands of the said H. Mills the sum of 100*l.*,

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which is to be allowed in part of payment at the completion of this agreement; but, if the said H. Mills should not fulfil the same on his part, he shall return the deposit in addition to the damages hereinafter stated; and, if the said W. Tweed should fail to fulfil his part of this agreement, then the deposit-money shall become forfeited in part of the following damages: and if either of the said parties shall neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them, on demand, the sum of 300*l.*, hereby mutually agreed upon to be the damages fixed on breach hereof."

On a draft lease being sent to the plaintiff for his approval, he found that it contained a covenant (which had been copied from the original lease under which Field & Hanbury held) not to carry on the business of a licensed victualler upon the premises. The plaintiff thereupon declined to carry out the agreement, and demanded back his deposit; and, on the defendant's refusal to comply with his demand, the present action was brought.

On the part of the defendant, it was submitted that the memorandum produced did not sustain the declaration; and that he only contracted to sell such interest as he had in the premises.

For the plaintiff it was submitted that the agreement contained an absolute undertaking on the part of the defendant that Field & Hanbury had a good title to convey, and that they should grant the plaintiff a lease of the premises for the term mentioned in the margin.

Under the direction of the learned judge, a verdict was entered for the plaintiff, damages 30*l.*, leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that the declaration was not proved.

Huddleston, Q.C., having obtained a rule nisi accordingly,

Tindal Atkinson, Serjt., and *Le Breton*, shewed cause. The plaintiff was justified in declining to accept a lease containing the clause against carrying on the very business for the purpose of carrying on which he contracted to purchase the goodwill; and it was no answer to say that the superior landlord was not likely to take advantage of the breach of that covenant. In truth, the

defendant had not any such interest in the premises as he contracted to sell. The plaintiff was entitled to have a good title made out, as in a suit for specific performance: *Shepherd* v. *Keatley*. (1) "If," as Gurney, B., there observes, "the vendor meant to protect himself at all events from the defects in his lessor's title, he ought to have used unambiguous language." In *Souter* v. *Drake*, (2) it was held, that, in every contract for an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise. Here, the defendant expressly stipulates that he will procure a lease to be granted by Field & Hanbury.

[BYLES, J. Does he do more than contract to sell such an interest as he has in the premises? The plaintiff incurred no real danger: there can be no doubt that Field & Hanbury would have indemnified him.]

The note in the margin is part of the agreement. The plaintiff was entitled to have a perfect title, and was not bound to accept of an indemnity: *Blake* v. *Phinn*. (3)

[ERLE, C.J. In *Spratt* v. *Jeffery*, (4) by contract A. agreed to sell to B. the two leases and goodwill in trade of a public-house and shop adjoining for 4250*l*., "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned; and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and, upon payment of the 4250*l*., A. agreed to execute an effectual assignment of the said leases, and deliver up possession of the premises: and it was held that the true meaning of this agreement was, that the vendee was to purchase the two leases *without inquiring into the title of the lessor*, and could not refuse to complete his purchase on account of an objection to that title. Here, all that the defendant contracts to sell, is, "all his right, title, and interest of the house and premises now in his possession."]

He further engages that Messrs. Field & Hanbury shall grant the plaintiff a lease of thirty-five years at the rent of 200*l*. That means, of course, a valid lease.

(1) 1 C. M. & R. 117.
(2) 5 B. & Ad. 992.
(3) 3 C. B. 976.
(4) 10 B. & C. 249; 5 M. & R. 188.

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Huddleston, Q.C., and *Holl*, in support of the rule. The simple question is, whether the terms of the agreement support the declaration. The first count alleges that the defendant agreed to sell and assign to the plaintiff all his right, title, and interest in and to the Windsor Castle, and to do all such other acts and things as were necessary to obtain a legal transfer thereof to the plaintiff, and that he further agreed to procure for the plaintiff from Field & Hanbury a lease for the term of thirty-five years, at a certain rent, and also to make a good title for Field & Hanbury to the premises for that term. The defendant was in possession as tenant from year to year to Field & Hanbury; and by the agreement he agrees to let all his right, title, and interest in the premises on receiving a certain price for the goodwill, and to assign over and do all that was necessary to obtain a legal transfer of the beer and other licences to the plaintiff, and to sell him certain furniture, fixtures, and stock, at a valuation; and the plaintiff agrees to accept the premises, having a good title to the licences, and to pay the sum agreed for goodwill, &c. Then comes a proviso, that, if the plaintiff should not be accepted by Field & Hanbury as tenant at the rent stipulated, and "subject to the terms named in the margin," the deposit was to be returned, and the agreement to be void. All that is meant by the proviso and the reference to the margin, is, that, if Field & Hanbury should decline to accept the plaintiff as tenant and to grant him a lease, the deposit was to be returned and the agreement cancelled. There is no agreement to sell or assign any term, nor any undertaking that Field & Hanbury had a good title. The negociation having gone off through no default on the part of the defendant, the plaintiff has got all he could be entitled to, by the payment into court, on the money count, of the deposit and interest.

ERLE, C.J. I am of opinion that the rule should be made absolute to enter a verdict for the defendant upon the special counts founded on the agreement. A negociation took place between the parties for the purchase by the plaintiff of the goodwill of a public-house called the Windsor Castle, which the defendant was occupying as tenant from year to year to Field & Hanbury; and an agreement was entered into, the substance of

which is, that the defendant contracted to let all his right and interest in the premises for a certain sum, and assign over to him the beer and other licences, and to sell him the furniture, stock, &c., at a valuation. So far, there is nothing in the agreement to bind the defendant to assign to the plaintiff anything more than such a possession as he had. He was in as tenant from year to year; and, though the premises had long been held as a public-house, it turns out that they were held under a lease which was defeasible at the election of the superior landlord if the business of a licensed victualler should be carried on therein. The defendant had a perfect right to hold the premises and continue the business there until the lessor chose to avail himself of the forfeiture. Consequently, if it had stood there, the defendant would have been guilty of no breach of his contract. But afterwards comes a proviso in these terms,—"Provided Tweed is not accepted by Messrs. Field & Hanbury as a tenant at the rent of 120*l.*, and subject to the terms named in the margin, the deposit to be returned, and this agreement void." The terms in the margin were, amongst others, that "Field & Hanbury agree to grant Tweed a lease of thirty-five years, at 200*l.* rent," &c. Full effect is given to that proviso by holding the agreement to be at an end if the contingency pointed at should happen. The contingency did happen, and the defendant has returned the deposit. The plaintiff has declared upon the agreement, under a notion that the proviso amounts to a covenant on the part of the defendant that Field & Hanbury have a good and indefeasible title, and will grant the plaintiff a lease for the term mentioned. That, however, is a fallacy. The terms of the contract express a totally different relation between the parties.

BYLES, J. I am of the same opinion. It seems now to be well established, that, on the sale of a lease, there is an implied contract on the part of the vendor that he will shew a good title in the landlord. But that may be dispensed with; and the first words of this agreement shew that that was not the intention of the parties here. The defendant agreed to let to the plaintiff all his right, title, and interest in the premises in question, such as they were, and no more. The ordinary rule, therefore, does not apply to the present case. The first count alleges, as part of the defendant's

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promise, that a good title should be made by Field & Hanbury; the second contains a similar allegation; the third charges a false representation, but was abandoned at the trial; and the fourth, which seeks to recover the deposit, is answered by the payment into court. The only question for us is, whether the allegations in the first and second counts are sustained. I think they are not. My Lord has already pointed out that the stipulation as to the lease to be granted is not part of the defendant's contract, but only a proviso making the agreement void in a given event. The only appropriate count, therefore, was the count for money had and received. Under that, the plaintiff has recovered all he is entitled to.

KEATING, J. The defendant did not undertake that Field & Hanbury had title, and would grant a valid lease. All he intended was, to sell such interest as he himself possessed, with a proviso that the agreement should be void if a lease could not be procured.

Rule absolute.

Nov. 18.

GALLI *v.* MONGRUEL.

Practice—Service of writ abroad—Indorsement on writ—Leave to proceed—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 19, *Sch.* A. *No.* 3.

A writ of summons having been served on a foreigner resident out of the jurisdiction, with a notice indorsed allowing *seven* days for payment of the sum claimed, the time limited for appearance being *fourteen* days,—the Court refused leave to the plaintiff to proceed under section 19 of the Common Law Procedure Act, 1852; and held, that the irregularity was not waived by a subsequent admission of service and offer to settle.

THE defendant, a Frenchman, residing at Vienna, was served with a writ of summons requiring him to appear within *fourteen* days of the service thereof. The indorsement of the plaintiff's claim allowed *seven* days for payment of debt and costs, instead of the time limited for appearance, as provided by s. 19 and sched. A. No. 3, of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

Murray, after an ineffectual application at chambers, moved for leave to proceed, upon an affidavit shewing that, on the ninth day

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after service, the defendant had written a letter to the plaintiff's attorney, in which he admitted the service of the writ, and offered terms of settlement. It was submitted that this was a waiver of the irregularity, if any.

ERLE, C.J. I am of opinion that compliance with the requirement of notice of the number of days allowed to the defendant for payment of the debt, without further costs than the sum therein mentioned, is extremely essential; and that any copy of process served without such indorsement, or with an inaccurate indorsement, does not constitute a valid service upon which to found an application for leave to proceed under the statute.

BYLES, J. When the ninth day arrived, the defendant was led by the indorsement to believe that he was too late to pay the sum claimed, without incurring further costs.

WILLES, ~~BYLES~~, and KEATING, JJ., concurred.

Rule refused.

IN RE ALICE ROGERS.

Nov. 24.

Husband and Wife—Conveyance by Married Woman—3 & 4 W. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1.

An order having been made under the 3 & 4 W. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, enabling a married woman, without the concurrence of her husband, to dispose of her reversionary interest in Government stock to which she was entitled under the will of her brother, upon the usual affidavit of the wife that she was living apart from her husband by mutual consent,—the Court refused to rescind the order, after it had been acted upon and rights of third parties had intervened, upon the application of the husband, who swore that, though he generally resided apart from his wife (upon an allowance made to him out of her separate estate), he occasionally visited and slept with her.

ALICE ROGERS, being possessed of a reversionary interest in a considerable sum in the Government funds under the will of her late brother, and being desirous of settling a share of it upon one of her four children by a former husband upon the occasion of the child's intended marriage, in Trinity Term last, upon affidavits shewing that she and her present husband were, since the year 1860, living apart by mutual consent (he having an allowance of 400*l.*

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per annum out of her separate estate), and that he had refused to concur in a deed for the purpose proposed, unless his allowance was increased, obtained an order under the 20 & 21 Vict. c. 57, s. 1 (which extends the provisions of the 91st section of the 3 & 4 W. 4, c. 74, to personal estate), enabling her to dispose of her interest by deed without her husband's concurrence.

The marriage of Mrs. Rogers's daughter took place on the 28th of July last, a settlement having been made upon the faith of the above order. A few days previously to the marriage, the husband of Mrs. Rogers obtained a judge's order to suspend the order of this court until an early day in this term, upon an affidavit in which he swore that he and his wife were not at the time of the application living apart by mutual consent; for, that, although he generally resided in Chapel-street, Westminster, and his wife had for some time past been residing at Surbiton or Clapham, he once a week visited her, on those occasions taking his meals and sleeping with her; and, on an early day in this term, a rule *nisi* was obtained to rescind the order of the court.

Quain shewed cause, upon affidavits disclosing facts from which it appeared that the parties had been living upon very unhappy terms, and that the husband's sole object in these proceedings was to obtain an increase of his allowance. He submitted that it sufficiently appeared, upon all the affidavits, that Mr. and Mrs. Rogers were substantially living apart by mutual consent, within the meaning of the 3 & 4 W. 4, c. 74, s. 91, notwithstanding the occasional visits which the wife was subjected to; that the court were the exclusive judges of the sufficiency of the materials laid before them on these applications; and that to interfere now, when a marriage had taken place, and a settlement had been made upon the faith of the order, and the interests of third parties had intervened, would be manifest injustice, especially as the parties to be affected by it were not before the court.

Garth, in support of the rule, submitted that the affidavits now before the court abundantly shewed that the order was obtained upon an inaccurate statement of the mutual relations of the parties; that they were not "living apart by mutual consent" within the meaning of the statute; and that it was not possible for Dr.

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Rogers, the husband, to bring before the court persons of whose existence and rights he could have no knowledge, inasmuch as he could not have anticipated that Mrs. Rogers would execute a deed in pursuance of the order, whilst a summons for rescinding it was pending.

ERLE, C.J. In this case an order was made by this court in Trinity Term last, under the statute 20 & 21 Vict. c. 57, giving the court powers analogous to that conferred by section 91 of the 3 & 4 W. 4, c. 74, to make orders enabling a married woman to dispose of her separate interest in personal property without the concurrence of her husband. Several cases are mentioned in that section in which the court is impowered to make the order. One is, where the husband "shall be living apart from his wife by mutual consent." This order was made upon the affidavit of Mrs. Rogers, in which she distinctly swore that she was "living apart from her husband by mutual consent, in consequence of differences existing between them." The order is one which the court makes ex parte; and it is to be made "upon such evidence as to the court shall seem meet." The court, in the due exercise of its discretion, has made the order; and it has been acted on so as to confer upon Mrs. Rogers's daughter by a former husband, under the settlement made on her marriage, a title to a large sum of money; and events may happen which may give rise to very complicated interests under that deed. Under these circumstances, we should naturally be extremely unwilling to retrace our steps, and rescind the order we made, unless there were a clear legal right in some person to demand that of us. Dr. Rogers, the husband, now asks a rescission; and the ground he relies on is, that Mrs. Rogers deceived the court when she represented that she and her husband were living apart by mutual consent. The correspondence which is set out in the affidavits discloses a state of considerable unhappiness between these parties. The wife, it appears, is possessed of a very large fortune, and she and her husband had agreed to live apart on the terms that 400*l.* a year should be allowed to him out of her means. If the husband agreed to these terms, though subject to his right occasionally to visit his wife, their position does amount to a living apart by mutual consent, pro-

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vided she duly pays the annuity. I think these parties were so living apart that the wife was fully justified in making the affidavit she did. That Dr. Rogers is only influenced by mercenary motives, is abundantly shewn by his own letters, particularly one, the substance of which is:—"We are living apart; but, if you do not give me more money, I will compel you to return to cohabitation." Under these circumstances, I think we are fully justified in holding that our order must remain unrescinded. Considering Dr. Rogers's position, and that he has no interest whatever in the property, I can see nothing which should induce the court to strain the law in his favour.

WILLES and KEATING, JJ., concurred.

Rule discharged.

Nov. 25.

GRAY *v.* WILSON.

Practice—Compulsory reference—Authority of master.

Upon a reference to the master under the Common Law Procedure Act, 1854, s. 3, of an action upon a building contract, although the master cannot delegate his authority, it is competent to him to inform his mind as to the amount and value of the work done, by sending a surveyor in whom he can confide to view and report to him thereon. But this does not preclude the parties from offering independent evidence on the subject, if so advised.

2 C.P. 395

AN action upon a builder's bill, in which the plaintiff claimed 827*l.* 16*s.* 9*d.*, for work done under a contract and for extras, was referred to a master, under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3.

The defendant's attorney relied before the master upon a written contract: but the master, being of opinion that the contract had been waived, and that the only question was as to the amount of work actually done by the plaintiff, before any witnesses upon that point had been called, stated that he should send down a surveyor to survey the work and report to him as to its value, and should give his certificate for the sum so reported. The defendant's attorney objected to this course, as being an improper delegation of authority, and intimated his intention to take the opinion of the court upon it: whereupon, after some discussion, the master, upon the understanding that the matter would be brought

before the court, gave a certificate for the full amount claimed by the plaintiff.

Robinson, Serjt., on a former day, moved to rescind the certificate, on the ground that the master had materially exceeded his authority in delegating to a surveyor the duty which the order of reference imposed upon himself.

The rule having been suspended, in order that the court might communicate with the master on the subject, the master now stated, that, in the course he had proposed to take for the purpose of ascertaining the amount and value of the work done, he had only done that which was the uniform practice of the masters of all the courts, as being the most convenient and least expensive course to the parties; but he at the same time intimated that the sum certified by him was not intended as a final award, he having given his certificate merely as a matter of form, upon the understanding that the defendant was to take the opinion of the court.

The matter was thereupon referred back to the master by consent (*Laxton* appearing for the plaintiff), the costs of and occasioned by the abortive meeting, and of the master's certificate, and of the application to the court, to be plaintiff's costs in the cause in any event.

ERLE, C.J. I think the course adopted by the master upon this and similar occasions, to send down a competent surveyor to the premises to view and report to him, rather than inform his mind by means of the always conflicting testimony of partizan surveyors, was a reasonable and proper course. But, at the same time, I think the parties should not be precluded from calling their witnesses, if so minded.

WILLES, J. I cannot entertain a doubt that it is competent to the master in these cases to take all reasonable means to enable him to form a right judgment. Practically, it is the most convenient course that could be adopted. The court has already affirmed, that, if the master has proceeded in that way, they will not set aside his certificate. Still, I think that the master cannot properly refuse to receive the evidence of any witnesses the parties may choose to call. This is a power which should be exercised

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with a wise discretion, and only when the master feels that he cannot form a proper judgment without it.

BYLES, J. As soon as it was decided by the courts that a builder's contract was a proper subject of reference to the master under the compulsory clauses of the Common Law Procedure Act, 1854, the mode of conducting the reference was necessarily left very much to the master's discretion. In heavy and complicated cases, it is impossible for the master to see otherwise than with the eyes of a surveyor. The master must not delegate his judicial functions to the surveyor, but must exercise his own judgment on the surveyor's report, as he does on the other facts of the case, or as he would do on the impressions produced on his own mind by a personal inspection. So far from this course being likely to be productive of delay, error, or undue expense, I believe that many cases would, by its adoption, be disposed of more inexpensively, more satisfactorily, and more expeditiously, than by means of the conflicting testimony of surveyors called for the purpose of enhancing the claim on the one side and cutting it down on the other.

Rule accordingly.

HADLEY *v.* TAYLOR AND OTHERS.

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Nov. 3.

Nuisance—Negligence—Highway—Liability to fence—Occupier.

The plaintiff, in passing along a highway at night, fell into a "hoist-hole," which was within fourteen inches of the public way and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor:—

Held, that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole; and that the hole was near enough to the highway to constitute a nuisance.

THIS was an action for an injury sustained by the plaintiff in consequence of his having fallen into a hole on the defendants' premises adjoining a public highway.

The declaration stated that the defendants were occupiers and possessed of a certain warehouse and a hoist-hole, vault, or cellar adjoining a public highway, and wrongfully suffered the said hoist-hole, vault, or cellar to be open to the said highway without any light, railing, fence, or protection, so as to be dangerous to persons lawfully passing along the said highway during the hours of darkness; and that the plaintiff, while lawfully passing along the said highway during the hours of darkness, fell into the said hoist-hole, vault, or cellar, and was injured.

Plea Not Guilty, and issue thereon.

The cause was tried before Byles, J., at the last Worcester Assizes, when it appeared that the plaintiff, whilst walking at night along a not much frequented street in Manchester, fell into an unprotected "hoist-hole," which was within fourteen inches of the highway, and was constructed for the purpose of raising goods from the cellar to the upper floors of the warehouse, whereby his leg was broken, and he was otherwise seriously injured. The building of which this hole formed a part was unfinished; but the defendants had been permitted to occupy one floor of it, and to use the hoist-hole, whilst a lease of the premises to them was in course of preparation. The builders had a watchman at the spot night and day, and were about to put gates to the hole to protect it, before completing the building.

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On the part of the defendants it was contended that the premises were not in their occupation or under their control, so as to impose upon them the duty of protecting the hole. On the other hand, it was insisted, that, being in possession of part of the premises, and actually using the hoist-hole for the purposes of their business, they were responsible for the consequences of leaving it in an insecure state.

The learned judge left it to the jury to say whether or not the defendants were in possession of the cellar, and whether they suffered the hole to remain in a dangerous state.

The jury answered both questions in the affirmative, and returned a verdict for the plaintiff, damages 250*l*.

Powell, Q.C., moved for a new trial, on the ground of misdirection. The hole in question was not near enough to the public highway to constitute it a nuisance; and, assuming that it was so, the defendants had not such a possession of the premises as to render them liable for the consequences of its unfenced condition. Either the builders or the landlord were the persons under whose control the premises were, and they or one of them must be responsible for their unsafe condition.

[BYLES, J. The defendants were in as tenants, and were actually using the hoist-hole. The question is whether that is not a sufficient occupation to render them liable for the continuance of the nuisance, if the hole was one.

WILLES, J. At all events, they had such an occupation as would have entitled them to maintain trespass.

BYLES, J. The defendants were to be tenants at a rent agreed upon. A draft lease had been prepared, and the defendants were for their own convenience allowed to occupy a portion of the building in its unfinished state. The case is very like that of *Barnes* v. *Ward*. (1) The hole, which was within a very few inches of and upon a level with the public street, was unfenced, and the jury found that the defendants were in possession, and that they suffered the hole to remain in a dangerous state. If there was no evidence of that, there was misdirection.]

In *Barnes* v. *Ward* (1), the hole abutted on the highway, and there

(1) 9 C. B. 392; 19 L. J. (C. P.) 195.

was no question as to the defendant's possession of the premises. The point underwent considerable discussion in the recent case of *Robbins* v. *Jones*. (1) It is extremely difficult to draw the line between what is and what is not such a proximity to the highway as to constitute an actionable nuisance.

[WILLES, J. The distinction, I recollect, was well laid down by my brother Blackburn in a late case. (2) He says that it depends on whether a person may be injured through an accident happening to him on the highway or whether he must wander from the highway before he is in any danger. A person may certainly accidentally step a foot off the highway. It is said that the plaintiff contributed to the accident by his negligence in walking, but of this there is no evidence; and, if there were, it would be a question for the jury.]

ERLE, C.J. I am of opinion that there should be no rule in this case. The plaintiff seeks compensation for an injury which he has sustained through falling into a hole on the defendants' premises. The hole was not upon the public highway, but distant from it about fourteen inches. I think, however, the defendants (assuming them to be in possession of the adjoining premises) would be liable for a nuisance to the highway, if the excavation was so near to it that a person lawfully using the way, and using ordinary caution, accidentally slipping, might fall into it. So is the law laid down in *Barnes* v. *Ward* (3), and in numerous other cases. Then, were the defendants the persons liable? I think they were. They were in the occupation of a portion of the premises. It has been insisted on their behalf that they are not responsible for the unprotected condition of the hoist-hole, because the premises were unfinished, and therefore the builders or the landlord alone had control over it, and would alone be responsible for its unprotected state. But the defendants, at all events, had a partial or temporary possession: and I am of opinion that that argument affords no answer to the plaintiff's claim. Generally speaking, the party responsible for a nuisance is the person in the occupation of the

(1) 15 C. B. (N. S.) 221; 33 L. J. (C. P.) 1.

(2) The learned judge probably referred to *Binks* v. *The South Yorkshire Railway and River Dun Company*. 3 B. & S. 244; 32 L. J. (Q. B.) 26.

(3) 9 C. B. 392; 19 L. J. (C. P.) 195.

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premises in which the nuisance complained of exists. It may be that others may be liable also: but the occupier, who probably knows most about it, is bound to see that no dangerous nuisance exists on the premises.

WILLES, BYLES, and KEATING, JJ., concurred.

Rule refused.

STUBBS *v.* HORN.

1865
Nov. 25.

Bankrupt—Petitioning-creditor trade-assignee, liability of, and for messenger's fees.

The petitioning-creditor is personally liable, under the 114th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), for the fees of the messenger in bankruptcy, down to the choice of assignees. And the trade-assignee is liable for those incurred subsequently, where there is evidence of personal interference by him, such as giving directions as to the management of the bankrupt's property while in the messenger's possession.

THIS was an action by the plaintiff, a messenger in bankruptcy, for his fees. The defendant was the petitioning-creditor and also the trade-assignee. By the summons the plaintiff claimed 23*l.* 4*s.* 8*d.*, for fees alleged to be due to him as messenger in the matter of the bankruptcy of Baumann and Barrett, who carried on business at Chiswick,—12*l.* 15*s.* 9*d.* of the amount being claimed for fees and charges down to the choice of assignees, and 10*l.* 8*s.* 11*d.* for possession-money subsequently thereto.

At the trial in the Lord Mayor's Court, London, before the Common Serjeant, it appeared that the petition by the defendant was filed on the 24th of March, 1859, that the adjudication took place on the 25th, and that the defendant was appointed trade-assignee on the 19th of April; that the warrant of the commissioner directing the plaintiff to take possession of the bankrupt's goods was issued on the 25th of March; and that the plaintiff received verbal directions from the defendant's attorneys, to send a man down to Chiswick to take possession, which he did. The following letters which were addressed to the messenger by the defendant's attorneys were also put in:—

"15th April, 1859.

"*Re Baumann and Barrett.*

"DEAR SIR,—We regret to find that your man has allowed the

business of the Institution to be continued. We have not been authorized to allow this, and have given no authority for it, and cannot allow the petitioning-creditor to be made answerable for it in any way. The money the printer's foreman has received, has been received improperly; and the parties will have to pay it again."

"21st April, 1859.

"*Re Baumann and Barrett.*

"DEAR SIR,—At a meeting held at the official assignee's this morning, it was decided not to interfere with Messrs. Robarts & Roby, but to allow them to sell and remove anything they please, at their peril, a correct account of all goods removed or sold by them, with the prices, if sold by auction, being kept by your man on the premises; and also, that, with the exception of your man or men, no persons on the premises be taken into the employ of the assignees; and that no business of any description be allowed to be carried on there. Will you do me the favour to instruct your man accordingly."

"20th May, 1859.

"*Re Baumann and Barrett.*

"DEAR SIR,—Have Messrs. Robarts & Roby cleared these premises? They stated that they intended to do so. If they have cleared away everything, or if they state to you they intend to do so, it will be useless to remain in possession longer."

On the part of the defendant, it was submitted that he was not liable to the messenger for his fees; for that, in taking possession of the bankrupt's property, the messenger did so as the officer and in obedience to the warrant of the court of Bankruptcy; and reliance was placed upon *Hamber* v. *Hall* (1), where it was held that the trade-assignee is not liable to the messenger for work done in the time of the trade-assignee, unless there has been either an express contract or an express employment by the trade-assignee; and also upon a case of *Cooper* v. *Headley*, tried before Pollock, C.B., at the sittings in London after Hilary Term, 1859, where that learned judge, upon the authority of *Hamber* v. *Hall* (1), ruled that the assignees are only responsible to the messenger for his fees as a matter of contract.

(1) 10 C. P. 780; 20 L. J. (C. P.) 157.

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For the plaintiff it was insisted that the parol evidence and the letters shewed such an amount of personal interference on the part of the petitioning-creditor and trade-assignee, through his solicitors, as to render him personally liable to the messenger, independently of his liability as matter of law: and *Stubbs* v. *Twynam* (1) was referred to.

It was at first arranged that a verdict should be entered for the plaintiff, by consent, for the full amount, 23*l.* 4*s.* 8*d.*, leave being reserved to the defendant. But the learned Common Serjeant expressed a desire further to consider the matter: and on a subsequent day he said he did not think that sufficient contract had been shewn between the defendant's attorneys and the plaintiff to render the defendant liable; and that he was also of opinion that the plaintiff should rather have applied to the court of Bankruptcy than brought an action. He thereupon directed that the verdict should be entered for the defendant, leave being given to the plaintiff to move to enter the verdict for him for the whole, or for such part of the claim as the court should direct.

H. James, on a former day in this term, obtained a rule nisi to enter a verdict for the plaintiff for 12*l.* 10*s.* 9*d.*, or 23*l.* 4*s.* 8*d.*, as the court should direct. He referred to the 114th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, to shew that the petitioning-creditor is liable for all costs of prosecuting the petition down to the choice of assignees; and to *Stubbs* v. *Twynam* (1), to shew that there had been such an interference on the part of the defendant's attorneys as to render the defendant liable, as well in his character of trade-assignee as in that of petitioning-creditor, if the question were one of contract.

Lionel Smith shewed cause. *Hamber* v. *Hall* (2) and *Stubbs* v. *Twynam* (1) are distinct authorities that the trade-assignee is not liable to the messenger for his fees, in the absence of an express contract or an express employment by him; and the same rule applies to the petitioning-creditor.

[WILLES, J. In *Burwood* v. *Felton* (3), it is laid down by

(1) 7 C. B. (N. S.) 719; 30 L. J. (C. P.) 8.

(2) 10 C. B. 780; 20 L. J. (C. P.) 157.

(3) 3 B. & C. 43; 4 D. & R. 621.

Abbott, C.J., that the petitioning-creditor is personally liable to the messenger for fees due to him antecedently to the choice of assignees. "The statute," says his lordship, "points out the mode in which his expenses are to be paid."]

That was before the 1 & 2 Wm. 4, c. 56, when the trade-assignee had possession of the goods.

[BYLES, J. The petitioning-creditor has been held liable in many cases since official assignees have been appointed.]

If a contract were necessary to render the defendant liable, there clearly was none here. The messenger, in going to Chiswick to take possession of the property, was acting in obedience to the warrant of the commissioner. All that the defendant (or his attorneys) did, was, to inform the messenger where the property was to be found, and to make some remarks upon the way in which the officer was performing his duty. As to the 114th section of the Bankrupt Law Consolidation Act, 1849, all it enacts is, that "the petitioning-creditor shall at his own costs file and prosecute his petition until the choice of assignees by the creditors." It is no part of his duty to get in the bankrupt's estate.

H. James was not called upon to support the rule.

ERLE, C.J. I am of opinion that the rule should be made absolute for the expenses incurred by the messenger as well before as after the defendant was appointed trade-assignee under the fiat. The petitioning-creditor of his own free will sets the proceedings in motion for the purpose of obtaining payment of his debt. It must be assumed that he contemplates that there will be funds available for the expenses. The 114th section of the Bankrupt Law Consolidation Act, 1849, provides that the petitioning-creditor shall *at his own costs* file and prosecute his petition until the choice of assignees by the creditors: and the court of Bankruptcy at or after the sitting for such choice is to make order for the payment thereof out of the estate of the bankrupt. It was laid down in *Burwood* v. *Felton* (1), that the petitioning-creditor is liable to the messenger for expenses incurred in his time, without any express contract. It is unnecessary, therefore, upon this part of the case

(1) 3 B. & C. 43; 4 D. & R. 621. And see *Hamber* v. *Purser*, 2 C. & M. 209; *Hamber* v. *Roberts*, 7 C. B. 861.

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to consider whether the directions by his attorneys to the messenger rendered the defendant liable as upon a contract. Then, as to the other portion of the claim, in respect of which the defendant is charged as trade-assignee,—it is said, that, in order to render him liable for these expenses, it is necessary to shew an express employment of the messenger by him. It seems to me that the letters which passed between the defendant's attorneys and the messenger disclose such an interference with him by the defendant's agents, as, upon the authority of *Stubbs* v. *Twynam* (1), to render the defendant liable in his character of trade-assignee. I therefore think the plaintiff is entitled to recover in respect of both claims.

WILLES, J. I am of the same opinion. As to the messenger's fees incurred before the choice of assignees, I would refer to the 108th section of the Bankrupt Law Consolidation Act, 1849, which renders the petitioning-creditor, either alone or jointly with the messenger, liable for anything done by the messenger in obedience to the warrant of the court. That confirms, if necessary, the notion that the petitioning-creditor is liable for the messenger's fees. As to the rest, it is a question of evidence; and *Stubbs* v. *Twynam* (1) shews that the evidence here was abundantly sufficient to sustain the plaintiff's claim.

BYLES, J. As to the first part of his demand, the 114th section is decisive in favour of the plaintiff; the petitioning-creditor is to proceed at his own costs until the choice of assignees; he is to file and *prosecute* his petition, and is to be repaid out of the bankrupt's estate, if any. He institutes the proceedings, and sets the messenger in motion. It has been decided that he must pay the messenger's fees, without more. As to the rest, I entirely subscribe to the judgment of my Lord.

Rule absolute.

(1) 7 C. B. (N. S.) 719; 30 L. J. (C. P.) 8.

WILSON AND ANOTHER *v.* LONDON, ITALIAN, AND ADRIATIC STEAM NAVIGATION COMPANY LIMITED.

1865
Nov. 14.

Ship and Shipping—Bill of Lading—Merchant Shipping Act 1862 (25 & 26 *Vict.* c. 63) *s.* 67—*Power to shipowner to land goods.*

By proviso in a bill of lading, simultaneously with the ship being ready to unload the whole or any part of the goods (forty pipes of lemon juice), the consignee was bound to be ready to receive the same from the ship's side; and in default, the master or agent of the ship was authorized to enter the goods at the Custom House, and land, warehouse, or place them in lighters at the risk and expense of the consignee.

After part of the goods had been landed by the shipowner, but not before, the consignee was ready and offered to receive the remainder, but the shipowner refused to deliver them to him, and landed them himself:—

Held, that the contract was divisible; and that unless the shipowner had been prejudiced in the delivery of the remainder, by the default of the consignee in not being ready to receive the whole, he was bound to deliver them.

Semble, that the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63) s. 67, arts. 5 & 7 should be similarly construed.

THIS was an action by the holders of two bills of lading against the owners of a steamer called the *Adria*, for improperly landing the goods at the wharf at which the steamer was discharging instead of delivering them to the plaintiffs, whereby the plaintiffs were obliged to pay wharfage dues, and demurrage for lighters, and other expenses.

Declaration, that the plaintiffs were owners of goods, to wit, sixty-five pipes of lemon-juice, within the meaning of the Merchant Shipping Act, 1862, and were entitled, as agents for the owners thereof, to the possession of the same, and the defendants were the owners of a ship called the *Adria*. That the goods were imported in the ship from foreign parts into the United Kingdom, and that before the goods were landed or unshipped, the plaintiffs made entry of the goods within the meaning of the said act for the landing and warehousing thereof at their wharf, called Wilson's Wharf, which was not the wharf at which the ship was discharging, and were entitled and ready and offered to take delivery of the goods, of all which premises the defendants had notice. That all things were done, &c., to entitle the plaintiffs to take such delivery and to land the said goods, yet the defendants did not allow them

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so to do, but without the consent, and contrary to the express directions, of the plaintiffs, landed and unshipped the goods at a wharf, to wit, &c., other than the plaintiffs' wharf, which had been named in the entry as aforesaid. That by reason of the premises the plaintiffs were compelled, in order to obtain possession of the goods, to pay expenses incurred by reason of such landing and unshipping, and also lost the use of and had to pay demurrage for lighters and barges, and for the services of persons they had employed to take delivery and obtain possession of the goods, which the defendants failed to make, and did not allow the plaintiffs to take as thereinbefore mentioned.

The declaration contained also a count in trover, and the common money counts for demurrage, money paid, and money received for the use of the plaintiffs, and on accounts stated.

The defendants pleaded to the first count—1st. That the defendants did not land the goods as alleged; 2nd. That the plaintiffs did not make entry of the goods as alleged; 3rd. That the plaintiffs were not ready and did not offer to take delivery of the goods as alleged; 4th. That the goods were carried by the defendants under the terms of a bill of lading, wherein a certain time was expressed for the delivery of the goods, and that the plaintiffs were not at the said time nor at any time subsequently, down to and at the time of the landing of the goods, ready and willing to take delivery of the goods, whereupon the defendants landed the goods on a wharf suitable and proper for that purpose; 5th. That the goods were carried by them under a bill of lading, and upon, amongst other terms, the conditions following, that is to say, that "simultaneously with the ship being ready to unload the goods, or any part thereof, the consignee of the goods should be bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship might lie for discharge or into lighters provided with a sufficient number of men to receive and stow the goods therein, and in default thereof, the master or agent of the ship should be and he was thereby authorized to enter the goods at the custom-house, and land, warehouse, or place them in lighters at the risk and expense of the consignee of the goods;" and that after the arrival of the ship with the goods, the ship was ready to unload the goods, and that the consignees were not ready to receive

them according to the terms of the said condition, wherefore the master of the ship entered the goods at the custom-house, and landed them in accordance with the terms of the said condition. To the other counts of the declaration the defendants pleaded the general issue.

The cause was tried, at the sittings in London after last Trinity Term, before Erle, C.J., when the following facts appeared:—The defendants were the owners of the steamer *Adria*, which traded between the Mediterranean and London. The plaintiffs were the holders of the bills of lading of two parcels of lemon-juice, containing respectively forty pipes and twenty-five pipes, part of the cargo of the *Adria*. The bills of lading were in the usual form, but contained the following clause: "Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and store the said goods therein, and in default thereof the master or agent of the ship is hereby authorized to enter the said goods at the custom-house, and land, warehouse, or place them in lighters, at the risk and expense of the said consignee of the goods after they leave the deck of the ship, and the owners of the ship are to have a lien on the said goods until the payment of all costs and charges so incurred."

The *Adria* arrived in London shortly after noon on March 23rd, and made a provisional entry of her cargo, including the two parcels of lemon-juice, at the custom-house, authorizing its discharge at Fresh Wharf. The same afternoon the plaintiffs made a complete entry of the two parcels of lemon-juice, and gave due notice of it to the defendants so as to entitle them to receive the lemon-juice on sending lighters for it at the proper time. The *Adria*, having arrived at her discharging berth at Fresh Wharf, commenced discharging her cargo shortly before midnight, and continued to discharge it all night. Between seven and eight in the morning of the 24th, the two parcels of lemon-juice were, in the course of discharge, arrived at, and, the plaintiffs not being ready to receive them, the defendants commenced landing them at Fresh

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Wharf. Shortly afterwards, the plaintiffs' lighterman came on board, but the plaintiffs' lighters were not ready to receive the goods till nine o'clock, at which time part of both parcels, amounting together to fifteen pipes, had been landed. At that hour, however, the plaintiffs were ready with lighters and men to receive the remainder, but the defendants refused to deliver, and landed the other fifty pipes also at Fresh Wharf. The plaintiffs, in consequence, were compelled to pay certain wharfage charges, amounting to 8*l.* 11*s.* 8*d.*, in respect of the fifty pipes so landed, in order to obtain possession of them. It was to recover this sum, together with a sum of 3*l.* 10*s.*, paid by the plaintiffs for detention of lighters and loss of lightermen's time, that the action was brought.

It was contended by the plaintiffs that, although the defendants were justified in continuing to land the lemon-juice until they, the plaintiffs, were ready with lighters to receive it, yet, after they were so ready, they were entitled, both under the terms of the bill of lading and of the Merchant Shipping Act, 1862, s. 67 (1), to have the remainder delivered to them.

(1) The Merchant Shipping Act, 1862, s. 67, provides as follows:—

"Where the owner of any goods imported in any ship, from foreign parts into the United Kingdom, fails to make entry thereof, or having made entry thereof, to land the same or take delivery thereof and to proceed therewith with all convenient speed by the times severally hereinafter mentioned, the shipowner may make entry of, and land or unship the said goods at the time, in the manner, and subject to the conditions following (that is to say):—

(1) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed.

(2) If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, after the report of the ship.

(5) If at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner.

(7) If at any time before the goods are landed or unshipped, the owner thereof has made entry for the landing and warehousing thereof, at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of

The defendants contended that the plaintiffs, by not being ready to receive the lemon-juice when the defendants were ready to commence unloading, had broken the condition of the bill of lading, and had thereby entitled the defendants to land the whole upon the wharf.

A verdict was entered for the plaintiffs for 12*l.* 1*s.* 8*d.*, with leave to the defendants to move to enter a verdict for them if, in point of law, the plaintiffs, upon the above facts, could not sustain the action.

Watkin Williams having obtained a rule *nisi* accordingly,

Brown, Q.C., and *F. M. White* (Nov. 14), shewed cause. The bill of lading does not express a time within the meaning of the Merchant Shipping Act, 1862, s. 67, art. 1; it only says that when the ship is ready to unload, the consignee must be ready to receive the goods, but it does not say at what time the ship will be ready to deliver the goods.

[ERLE, C.J. It does not express a time by the clock, but that is not necessary.]

The next article says, "If no time is mentioned, then at any time after the expiration of seventy-two hours from the report of the ship;" and the time mentioned in the bill of lading, therefore, should be some number of hours after a definite point of time. Unless the bill of lading imposes on the ship an obligation to deliver at a particular time, the section is not complied with: in this case the time for delivery is as indefinite as possible. It would, too, be unreasonable to consider "simultaneously with the ship being ready to unload" as "a time" within the meaning of the statute, because the plaintiffs could not receive the goods before, and there is no time allowed subsequently.

Secondly, if the bill of lading does fix a time, article 5 of the same section entitled the plaintiffs to the delivery of the goods. If the plaintiffs had been ready before any of their goods had been actually landed, this could not be questioned; and the main question is, whether article 5 applies after any of the goods have been

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the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he land or unship the same without such notice, do so at his own risk and expense.

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landed. If it does not, then, if one of a cargo of 5000 chests of tea has been landed, the shipowner will be entitled to land all the rest.

[WILLES, J. Such a construction would be manifestly absurd, because if there was one consignee of the whole cargo, and he was five minutes late, and one chest was landed, he would have to pay the wharfage charges on the whole cargo.]

The question in fact is, do the words "before the goods" mean "before any of the goods," or "before all the goods." Strict grammar as well as reason is in favour of the latter interpretation. The words in the bill of lading are to be construed in the same manner as those in the act of parliament, The case of *Beresford* v. *Montgomerie* (1) turned on the 7th article in the same section, and is not in point, except as shewing that the act of parliament gives a substantive right independently of any contract, and that article 5 will apply even though the time mentioned in the bill of lading has arrived. The act was not intended merely to interpret contracts or to give rights when there are no contracts, but to give further rights when a contract has been entered into.

[KEATING, J. If the bill of lading had said that if the delivery had once begun it should still continue, though the consignees were subsequently ready to receive the goods, would you say the statute still applied?]

That might be held to amount to an agreement that the statute should not apply. Here the object of the contract was simply to exclude the application of *Bourne* v. *Gatliff* (2), and it was to such cases that the statute was intended to apply.

Watkin Williams, in support of the rule.

The act was never intended to supersede a contract entered into by the parties, and as such a contract has here been entered into by the bill of lading, the rights of the parties must be regulated by that alone.

[ERLE, C.J. You may take it as clear that the parties may make a contract which will not be affected by the statute.]

Then the first point is immaterial, and the only question will be as to the construction of the bill of lading. The plaintiffs

(1) 17 C. B. (N. S.) 379; 34 L. J. (C. P.) 41.
(2) 11 Cl. & F. 45; 8 Scott N. R. 604.

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cannot be said to have been ready to receive the goods if they were not there to receive the first part of the goods; and they having made default, the master was entitled to land the goods. There is nothing unreasonable in this construction, because if the goods had been of a different kind the form of the bill of lading might have been different. In this case the goods carried by the *Adria* were of such a nature as to render a quick delivery of great importance to all parties. The fact that the goods were divisible, consisting of separate pipes of lemon-juice, cannot affect the question; there might have been a separate agreement for the carriage of each pipe, but there was not, and the case comes within the principle of *Ralli* v. *Janson*. (1)

[WILLES, J. Was there any evidence that it would have taken more time to deliver the remainder of the goods into the lighters than to land them on the wharf?]

No; except in so far as there is always difficulty and delay in getting lighters up to the side of a ship. The Merchant Shipping Act, 1862, s. 67, does not carry the matter any further because arts. 5 and 7 contain exactly the same ambiguity as the bill of lading.

ERLE, C.J. I think this rule should be discharged. The case turns on the construction of a clause in the bill of lading, which was introduced for the benefit of the shipowners, and provides that when the shipowner is ready to deliver the goods, or any part thereof, the consignee is bound to be ready to receive them, and that if he makes default, the shipowner shall be entitled to land them. In this case, the shipowner was ready to deliver the goods before the consignee arrived with lighters and was ready to receive them; but after the consignee had arrived, and was ready, there still remained fifty pipes of lemon-juice to be delivered, and I think that the duty of the shipowner with respect to these was not at all affected by the fact that fifteen pipes had been already landed. I do not think that it was the intention of the parties that, if the shipowner was ready to unload any part of the goods before the consignee arrived, he should become thereby entitled to unload the whole upon the wharf at which he was discharging;

(1) 6 E. & B. 422; 25 L. J. (Q. B.) 300.

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but that, as no loss or injury was caused to the shipowner by the consignee not having been ready to receive the first fifteen, the contract is divisible.

I think the same question would arise on the Merchant Shipping Act, 1862, and that with the qualification I have named, viz., that the shipowner can deliver the remainder without any further loss or injury than would have been the case if the consignee had been ready before any of the goods had been discharged, the consignee would be in time to claim the remainder, although part of the goods had been landed before he was ready to receive them.

WILLES, J. I am of the same opinion; and I shall content myself with pointing out the absurdity that would ensue if we adopted the construction contended for by the defendants. If the fifteen casks had belonged to A, and the remaining fifty to B, then although B had arrived after the fifteen had been landed, he would, of course, have been entitled to receive his fifty. But if only fourteen had belonged to A, and one of those belonging to B had been landed, then, according to the defendants, B would have been unable to obtain the other fifty, though to the shipowner there could be no difference whatever between the one case and the other. One at once rejects an interpretation which would lead to such an absurdity. We have an indication also in the bill of lading itself that it was intended to be apportionable, in the use of the words "or any part thereof."

I further entirely agree with the Lord Chief Justice that the true question is, whether the shipowner's position has been altered with respect to the part remaining undelivered? If it would have caused expense or loss of time to the shipowner to change the mode of delivery, it might well have been contended that authority had been given to him to land the goods on the wharf, by the default of the consignee in not being ready at first to receive his goods, and that such authority having been once acted upon, and expense incurred thereby, it could not be revoked, and that the shipowner was therefore entitled to land the remainder of the goods.

KEATING, J., concurred.

Rule discharged.

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Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122) *s.* 108—*Notice of Action*—*Cumulative penalty under s.* 94.

A person employed by a building-owner to erect a building adjoining the house of another, is not an "other person" within the meaning of the 108th section of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which requires a month's notice of action to be given before writ or process is sued out against "any district-surveyor or *other person*, for anything done or intended to be done under the provisions of the act."

The penalty imposed by s. 94 on a building-owner who fails to make good "any damage he may occasion to the property of an adjoining owner by any works authorized to be executed by him, or to do any other thing upon condition of doing which his right to execute such works is by s. 83 limited to arise," is cumulative.

THE first count of the declaration stated that the defendant was fulfilling a contract which he had undertaken for one Hogg, to build for him a house on certain land next adjoining a house and land of the plaintiff, and, in course of fulfilling the contract, by his workmen, did so negligently and unskilfully conduct himself in the execution of the contract as to undermine and otherwise damage the house of the plaintiff, &c.

The second count charged the defendant with negligence in underpinning and removing a party-wall between the plaintiff's house and Hogg's land, and thereby damaging the plaintiff's house, &c.

The third count was in trespass for breaking and entering the plaintiff's close and damaging his party-wall.

Plea, "not guilty, by statute," the statute referred to in the margin being the 18 & 19 Vict. c. 122, s. 108, public act. Issue thereon.

The cause was tried before Willes, J., at the sittings at Westminster after last Easter Term. The facts were as follows:—The plaintiff was possessed of a house, No. 23, Merchant Street, Bow Road, Middlesex, adjoining to which was a piece of vacant ground, of which one Hogg was the owner. In March, 1864, Hogg employed the defendant, a builder, to erect two houses for him on this piece of ground; and, as he proposed to have rooms on the basement of his houses, which the plain-

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tiff's house had not, it was necessary for the defendant to excavate the soil to a much greater depth than the foundation of the plaintiff's house; and, in doing this, the proper course to pursue was, to under-pin the party-wall piece by piece as the excavation proceeded, with 14-inch brick-work. The defendant, however, though repeatedly cautioned, did the work of underpinning so insufficiently (with 9-inch brick-work only) that the plaintiff's house sank, and the walls and ceilings were cracked and bulged.

It appeared that the defendant had given due notice to the district-surveyor, under the 38th section of the Metropolitan Building Act, 1855 (18 & 19 Vict. c, 122); but he had given no notice to the plaintiff as adjoining owner, under Part 3 of the act, which relates to the execution of any work in respect of a "party structure;" and it was contended on his behalf, on the authority of a dictum of Cockburn, C.J., in *Wheeler* v. *Gray* (1), and also of the case of *Newton* v. *Ellis* (2), that he was entitled to notice of action under the 108th section of the act. (3) The writ was issued on the 20th of January, 1865.

The jury found that the work of underpinning had been negligently done, and they returned a verdict for the plaintiff for 20*l*.

Leave having been reserved to the defendant to move, on condition that the matter should not go beyond this court—

Philbrick, in Trinity Term, obtained a rule nisi to enter a verdict for the defendant, on the ground that he was entitled to notice of action under the 108th section of the Metropolitan Building Act,

(1) 4 C. B. (N. S.) 584; 27 L. J. (C. P.) 267.

(2) 5 E. & B. 115; 24 L. J. (Q. B.) 337.

(3) Which enacts that "no writ or process shall be sued out against *any district-surveyor or other person* for anything done, or intended to be done, under the provisions of this act, until the expiration of one month next after notice in writing has been delivered to him, &c., stating the cause of action, &c.; and, upon the trial of any such action, the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in such last-mentioned notice; and, unless such notice is proved, the jury shall find for the defendant: and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards, and shall be laid and tried in the county or place where the cause of action accrued, and not elsewhere; and the defendant shall be at liberty to plead the general issue, and give this act and all special matter in evidence thereunder."

1855, and that the action was not brought within the prescribed time.

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Macnamara (Nov. 9th) shewed cause. The question is whether the building-owner or the builder who is sued for an injury done to the premises of an adjoining-owner by the negligent performance of work which he claims a right to do under the Metropolitan Building Act, 1855, comes within the description of persons entitled under s. 108 to notice of action. The protection given by that section for anything done or intended to be done under the act, is confined to "any district-surveyor or *other person*." It was evidently intended to be given only to persons acting as or under the direction of the district-surveyor. Such a person acts officially in the performance of duties which he is bound to perform: it is reasonable, therefore, that he should have a statutory protection. The builder, however, stands in a totally different position: he acts voluntarily; and there is no reason why he should be protected against the consequences of his negligence. If the provision in question were held to apply to a person in such a position, it would impose a very serious and unnecessary limitation of the common-law remedy of the person injured; for, in that case, every builder who was guilty of negligence in the exercise of his calling within the limits of the metropolis would have to be sued within six months after the accrual of the cause of action, while as against every one else the ordinary limitation of six years would apply. This never could have been contemplated by the legislature: and there is no necessity for giving such a construction to the words of the 108th section; for, there are many referred to in the earlier parts of the act to whom the words "other person" will apply. In the interpretation clause, s. 3, it is provided that the term "builder" shall apply to and include the master builder or *other person* employed to execute, or who actually executes any work upon any building; and that "person" shall include a body corporate; and "district-surveyor" shall include any deputy or assistant-surveyor appointed under the act. By s. 32, the metropolitan board of works are to appoint the district-surveyor; and, if from pressure of business or any other cause he cannot discharge his duties promptly and efficiently, the board may (by s. 36)

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appoint some "other person" to assist him. Again, by s. 37, if the district-surveyor is acting in any case on his own private account, the board are to appoint some *other district-surveyor* to act in respect of such matter. By s. 62, the board are impowered to appoint a person, to be called "superintending architect of metropolitan buildings;" and, if that person be prevented by illness, infirmity, or any other unavoidable circumstance, from attending to the duties of his office, he may (by s. 63), with the consent of the board, appoint some *other person* as his deputy, to perform all his duties. It is obviously unnecessary, therefore, in order to give a meaning to the words "other person" in the 108th section, to extend it to the building-owner or to the builder. The expression in the corresponding clause in the old Building Act, 14 Geo. 3, c. 78, s. 100, was, "any person or persons," and in the 7 & 8 Vict. c. 84, s. 108, "any person." The change of the phrase must have been made for some purpose; especially when it is remembered that the court of King's Bench, in *Collins* v. *Poney* (1), felt themselves hampered by the general words of the 14 Geo. 3, c. 78, s. 100, and compelled to apply the protection to a case which they considered could not have been within the intention of the legislature.

[WILLES, J. Is there any distinction between the "building-owner" and the "builder"?]

The building-owner has express power given him by the act (s. 83) to interfere with a party-structure: and probably the builder might justify under him. But, where the justification fails, and the action is for negligence, the protection clause clearly cannot apply to the builder. The decisions under the analogous clauses in the Bankrupt Acts sustain the view now submitted. In the 44th section of the 6 Geo. 4, c. 16, the expression was general, "any person;" and the clause was re-enacted in similar terms in the 12 & 13 Vict. c. 106, s. 159: and yet the assignees of a bankrupt who in the supposed exercise of their official duties improperly seized goods of third persons, were held not to be entitled to protection: *Carruthers* v. *Payne* (2); *Edge* v. *Parker* (3); *Knight* v. *Turquand*. (4) The well-known rule of construction is, that, "where general words follow particular ones, the rule is, to construe

(1) 9 East, 322.
(2) 5 Bingh. 270; 2 M. & P. 429.
(3) 8 B. & C. 697; 3 M. & R. 365.
(4) 2 M. & W. 101.

them as applicable to persons ejusdem generis:" per Lord Tenterden, in *Sandiman* v. *Breach*. (1) In that case, the driver of a stage-coach was held not to come within the description of "other person" in the Sunday Trading Acts, 3 Car. 1, c. 1, and 29 Car. 2, c. 7. So, in *Peate* v. *Dicken* (2), an attorney, and in *Reg.* v. *Sylvester* (3), a farmer, was held not to be within the latter act. On the same principle, in *Branwell* v. *Penneck* (4), a sheriff's bailiff was held not to be within the statute 22 Geo. 2, c. 19, giving jurisdiction to magistrates in cases of dispute between masters and labourers; and in *Kitchen* v. *Shaw* (5), a domestic servant was held not to be within the 6 Geo. 3, c. 25, s. 4, which gives the magistrates jurisdiction in certain cases of contract by any artificer, labourer, or other person. With regard to the case of *Wheeler* v. *Gray* (6), it is true that Cockburn, C.J., intimated that the inclination of his opinion was that a "building-owner" is within the words of s. 108: but it was not necessary for the determination of the point in judgment; and Willes, J., distinctly says, that, before coming to any conclusion upon that point, he should think it necessary to consider the decisions upon the 159th section of the Bankrupt Act, 12 & 13 Vict. c. 106, the words of which, he observed, are much more general, and have been held to apply only to officers who are bound to act in the performance of some duty, and not to assignees or persons who take upon themselves to act. That case came before the Exchequer Chamber (7), but nothing was there said about notice of action. Commissioners of sewers and commissioners of police have certain duties cast upon them by Part 2 of the act, in relation to dangerous structures: these, no doubt, would be protected.

[WILLES, J. The commissioners of sewers would be sufficiently protected as being a court of record, and the commissioners of police under the Police Acts.]

The cases which will probably be relied on for the defendant will all be found to fall within one of these classes,—first, of decisions on statutes where the only words used are "any person," or "every

(1) 7 B. & C. 96; 9 D. & R. 796.
(2) 1 C. M. & R. 422.
(3) 33 L. J., (M. C.) 79; 2 B. & S. 322.
(4) 7 B. & C. 536; 1 M. & R. 409.
(5) 6 Ad. & E. 729; 1 Nev. & P. 791.
(6) 4 C. B. (N. S.) 584; 27 L. J. (C. P.) 267.
(7) 6 C. B. (N. S.) 606; 28 L. J. (C. P.) 200.

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person," as in *Hughes* v. *Buckland* (1), on the 7 & 8 Geo. 4, c. 29, s. 75, and *Collins* v. *Poney* (2), *Pratt* v. *Hillman* (3), and *Wells* v. *Ody* (4), on the Building Act, 14 Geo. 3, c. 78, s. 100,—secondly, where the party fills the exact description of persons mentioned in the act, as in *Newton* v. *Ellis* (5), under the Public Health Act, 11 & 12 Vict., c. 63, s. 139, the words of which are " or other officer or person whomsoever acting under the direction of the local board,"—thirdly, where he is acting in the performance of some official duty, as in *Wallace* v. *Smith* (6), under the London Dock Act, 39 Geo. 3, c. 69, s. 185, *Smith* v. *Shaw* (7), under the Commercial Dock Act, 50 Geo. 3, c. 207, s. 94, and *Davis* v. *Curling* (8), under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 109.

Philbrick, in support of the rule. In order to ascertain the measure of protection intended to be given by the act, and the parties to be protected, it is necessary to see what the acts complained of were. Being employed by the building-owner to erect two houses adjoining the plaintiff's premises, the defendant would be bound by the act to give notice to the district-surveyor. This notice would state what was proposed to be done under the powers of the act. The several sections comprised in Part 3 define the respective rights of the building and adjoining-owners, and give the former certain powers of interfering with, pulling down, and rebuilding all or any portion of a party-wall or structure. Any damage done to the adjoining-owner by the exercise by the building-owner of the powers thus conferred upon him, he is to make good. This locus pœnitentiæ the building-owner and those employed by him would be deprived of, if the construction contended for on the part of the plaintiff be adopted, and it be held that the persons entitled to notice must be persons ejusdem generis with or employed under the district-surveyor.

[WILLES, J. To be within the protection of s. 108, the party must be doing or intending to do something under the provisions of the act, bonâ fide believing in the existence of something which the act would justify. What the defendant intended to do here,

(1) 15 M. & W. 346.
(2) 9 East, 322.
(3) 4 B. & C. 269; 6 D. & R. 481.
(4) 2 C. M. & R. 128.
(5) 5 E. & B. 115; 24 L. J. (Q. B.) 337.
(6) 5 East, 115.
(7) 10 B. & C. 277; 5 M. & R. 225.
(8) 8 Q. B. 286.

was, to underpin the party-wall. What he did, was, to leave the wall with an insufficient support. How can that be said to be a thing done "under the provisions of the act?"]

The defendant was clearly intending to act under the powers conferred upon the building-owner by the 83rd section of the act, otherwise he would not have been within the protection: *Hermann* v. *Seneschal* (1); *Roberts* v. *Orchard.* (2) In *Pratt* v. *Hillman* (3), where a person raising a party-wall, bonâ fide intended to comply with the directions of the Building Act, 14 Geo. 3, c. 78, but did not in fact do so, and injured the adjoining house, the owner of which brought trespass, it was held that the raising of the wall was to be considered as done in pursuance of the statute, and that the builder was entitled to the protection given by s. 100. The section clearly points to powers the exercise of which might entail certain consequences on the persons exercising them, unless they were protected. In *Edge* v. *Parker* (4), Bayley, J., says "It is not necessary to cite cases to shew that the expression 'in pursuance of' is applicable only where the party can be considered as founding his act upon the power given by the legislature." Those expressions, which have often been referred to with approbation, are precisely applicable here. That the words of s. 108 are wide enough to cover the defendant, but for the maxim nosciter a sociis, cannot be denied. The question is, does the maxim apply here: and that question is only to be determined by a reference to the general scope and object of the act; for, as Lord Coke says in *The Lincoln College Case* (5), "the office of a good expositor of an act of parliament is to make construction on all the parts together, and not of one part only by itself: nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit." The board of works and their servants and agents were already fully protected: so also were the police, by the Police Acts, 10 Geo. 4, c. 44, s. 41, and 2 & 3 Vict. c. 71, s. 53: none of these, therefore, could have been contemplated by s. 108 of this act. The question in *Newton* v. *Ellis* (6) was, whether the defendant was a person acting

(1) 13 C. B. (N. S.) 392; 32 L. J. (C. P.) 43.

(2) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(3) 4 B. & C. 269; 6 D. & R. 481.

(4) 8 B. & C. 697; 3 M. & R. 365.

(5) 3 Rep. 59. b.

(6) 5 E. & B. 115; 24 L. J. (Q. B.) 337.

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under the direction of the board of health. It was assumed that he was. "Then," said Lord Campbell, "was he not sued for something done or intended to be done under the provisions of the act? The action is brought for an improper mode of performing the work. How can that be called a non-feasance? It is doing unlawfully what might be done lawfully; digging improperly without taking proper steps for protecting from injury. That is a case expressly under the act. It would be very inconvenient if a different rule were to prevail. For, then, even if the defendant had done all he did lawfully, he would not be entitled to notice of action: he would not have protection in the exact case where it was required that he should be protected." That case is precisely in point in its reasoning, and almost in its facts.

[ERLE, C.J. The distinction pointed out by Mr. Macnamara, is, that there the defendant was acting under the express directions of the board, who had a duty to perform, and so was a person whom the legislature might well protect; whereas here the building-owner for his own purposes chooses to come and interfere with the plaintiff's premises, and does what he does negligently.]

He is acting in the exercise of a right.

[WILLES, J. There is nothing in the act which regulates the *manner* of exercising the rights of a building-owner. It must be done in a reasonable manner. The defendant undermined the plaintiff's wall, and underpinned it in an insufficient manner. How can that be said to have been done "under the provisions of the act?"]

What he professed and intended to do, the defendant had a right under the 8th, 9th, 10th, and 11th clauses of s. 83 to do; and everything he did was necessarily done under the supervision of the district-surveyor: see ss. 38—48.

[ERLE, C.J. The right is given subject to the condition imposed by the 7th clause, viz. "of making good all damage occasioned thereby to the adjoining premises." That condition has not been performed.]

A specific penalty is imposed for the breach of that duty by s. 94, viz. 20*l.* for each day during which such failure continues. As to the case of *Wheeler* v. *Gray* (1), it is true there was no deci-

(1) 4 C. B. (N. S.) 584; 27 L. J. (C. P.) 267.

sion upon this point; but Cockburn, C.J., intimated a very strong opinion that a person in the position of this defendant would be entitled to a notice of action. With respect to the cases under the Bankrupt Acts, there is this manifest distinction, that the seizure of goods of a third person by the assignees could not be said to be an act done "in pursuance of the act," inasmuch as the act only vests in them goods which belonged to the bankrupt.

[BYLES, J. When the protection of a notice was first given under the Bankrupt Acts, the assignees did not take the estate of the bankrupt under the act directly, but only by assignment from the commissioners.]

Here, it was properly a question for the jury whether in what he did the defendant intended to pursue the authority given him by the statute.

[WILLES, J. The defendant's counsel did not ask to have that question put to the jury. If they had done so, I do not think it would have availed him much, after the evidence that the defendant proceeded with the work having been warned of its insufficiency.]

ERLE, C.J. I am of opinion that this rule should be discharged. The action is brought against a tradesman employed by the "building-owner" to do certain work in respect of a party-wall between his house and the house of the adjoining-owner. The building-owner was desirous of deepening his premises; and in order to do this it became necessary to undermine the party-wall. It was the defendant's duty to support the structure by underpinning. He performed this duty so insufficiently that the party-wall sank, and the plaintiff's premises were injured. The defendant contends that he is entitled to judgment, because he had no notice of action under s. 108 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122). [His Lordship read the section.] The defendant was not the district-surveyor; nor was he authorized by the district-surveyor to do this insufficient work: on the contrary, he was expressly warned, and forbidden to proceed with it in the way he did. But it is contended on his behalf that he is entitled, under the description of an "other person," to the privileges conferred by s. 108. I think, however, some limitation must

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be put upon those words. The statute clearly was not intended to protect every person who, meaning to do something under the Building Act, might be guilty of a wrong to his neighbour. I come to that conclusion because I find that there were several previous statutes in which this sort of protection was given to every person acting in pursuance of their provisions; whereas here the protection is confined to any "district-surveyor or other person," which to my mind shews that it was intended to restrict it to a class of persons ejusdem generis with the district-surveyor, and that a tradesman who is employed by a building-owner in doing work on his own premises for the better enjoyment of them, and upon whom no duty is cast by the statute, is not an "other person" of the same class as the district-surveyor. I think that class was intended to embrace only those who are clothed with an official character, or upon whom some statutable duty is cast, so that they may be said to be acting or intending to act in pursuance of the statute. The words of the 108th section themselves help one in coming to this conclusion. The statutes and the numerous cases to which Mr. Macnamara has so ably directed our attention also strongly tend to shew that the intention of the legislature was the protection of persons in the performance of official duties. The case of *Newton* v. *Ellis* (1) at first appeared to be an authority the other way. But there the words giving the protection were "any superintending inspector, or any officer or person acting in his aid, &c., or the officer of health, clerk, surveyor, inspector of nuisances, or *other officer or person whomsoever* acting under the direction of the local board." The defendant had been employed by the local board to dig a well in a highway, and, in consequence of his neglecting to light or guard the excavation, the plaintiff, who was driving along the highway, sustained damage: and the court held that the defendant was "a person acting under the direction of the local board," in doing what was complained of in the declaration, and therefore that he was entitled to notice of action under the 11 & 12 Vict. c. 63, s. 139. That decision clearly has nothing to do with the point now before us. I am aware that this point arose in *Wheeler* v. *Gray* (2): but it was left with-

(1) 5 E. & B. 115; 24 L. J. (Q. B.) 337.
(2) 4 C. B. (N. S.) 584; 27 L. J. (C. P.) 267.

out adjudication: and I feel bound to give my judgment here in favour of the argument of Mr. Macnamara. I place also some reliance on the ground that the right which the building-owner was exercising here was one of the rights which the Metropolitan Building Act, by s. 83, gives to a private person to interfere with the rights of an adjoining-owner for his own benefit. The 8th article of the section gives the building-owner "a right to cut into any party structure, upon condition of making good all damage occasioned to the adjoining premises by such operation." The defendant was employed by the building-owner. He had a right under the statute to undermine the plaintiff's wall; but on the condition of making good all damage occasioned thereto by such operation. If he has failed to make good such damage, he has not performed the condition on which his right to do the act depends. Having done that which is an actionable wrong at common law, and having broken the condition upon which the statute made the act justifiable, he does not bring himself within the protection of the 108th section, even assuming that the view I have taken of the first point is erroneous. The penalty imposed by the 94th section is cumulative, and does not take away the common-law right. But, although I think the second point entitled to weight, I rely chiefly upon the first point so ably argued by Mr. Macnamara.

WILLES, J. I entirely concur with my Lord upon the main ground of his decision. I think it right to add, that, assuming Mr. Philbrick to have brought the defendant within the protection of the 108th section of the statute as an "other person," he would have had much difficulty in satisfying the court that he ought to have judgment on the other branch of Mr. Macnamara's objection, because it appeared from the evidence of one of the plaintiff's witnesses, not only that the defendant insufficiently underpinned the plaintiff's wall by putting 9-inch work where it ought to have been 14-inch, but that he persisted in doing it notwithstanding he was warned of the probable consequences. He must, therefore, have known that he was doing wrong. If that was a matter for the jury, the defendant did not ask to have it left to them; and there can be no doubt that he wisely abstained from doing so.

BYLES and KEATING, JJ., concurred.

Rule discharged.

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Nov. 9.

ROSE EDGELL, Executrix of Alexander Edgell, Deceased, *v.* DAY.

Solicitor and Client—Stakeholder—Deposit.

Where a *solicitor acting for a vendor* receives the deposit on the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as stakeholder. If he professes to receive it as agent for the vendor he is bound to pay it over to him on demand.

This was an action brought by the plaintiff, as executrix of Alexander Edgell deceased, to recover certain deposits which had been received by the defendant, when acting as solicitor to Mr. Edgell on the sale of certain property, and interest on each deposit from the time of its receipt until payment. The defendant paid into court the deposits, together with interest on each deposit, from the time of the completion of the purchase, in respect of which it had been made, to the date of the pleas; he denied his liability to pay interest on any deposit previously to the completion of the purchase in respect of which it was made. It was to recover such interest that the action was brought.

The declaration alleged that in consideration that Alexander Edgell would employ the defendant for reward, as his agent, in effecting the sale of certain properties, and to receive certain deposits to be made by the purchasers, the defendant promised the said Alexander Edgell that he would upon request, account to him for the money so received. Averment, that the said Alexander Edgell had requested him so to do, and that all conditions had been fulfilled &c. Breach, that he had not accounted either to the said Alexander Edgell in his life time, or to the plaintiff.

There was a second count *in tort* averring that the said Alexander Edgell had employed the defendant for reward, as his agent, to receive the deposits on the terms that he would account for them on request, that he had received the deposits as such agent, and had been requested to account for them, and all conditions had been fulfilled, &c., but that he had not accounted for them, either to the said Alexander Edgell in his lifetime, or to the plantiff. The declaration contained also the common money counts, including a count for interest.

The defendant traversed all the material allegations in the first and second counts, and also pleaded a special plea to so much of the first count as related to the not paying over the money to the said Alexander Edgell or the plaintiff, that he was employed by the said Alexander Edgell as his agent, to receive the deposits and hold them till the purchases were completed, or the deposits forfeited, and then to pay them over to the said Alexander Edgell, or if the purchases, or any of them were rescinded or set aside, to repay the deposits made on such purchases to the respective purchasers, and that, in consideration of such employment, he promised the said Alexander Edgell to hold and pay over the money according to the aforesaid terms, and not otherwise, and that at the date of the alleged breaches none of the purchases had been completed, and none of the deposits had been forfeited. To the indebitatus counts he pleaded, except as to 1604*l.*, never indebted, and that sum being the amount of the deposits, with interest at five per cent. on each, from the time of the completion of the purchase in respect of which it was made, he paid into court. The plaintiff took the sum of 1604*l.* out of court, and joined issue on the rest of the defendant's pleas.

The cause was tried before Willes, J., at the sittings at Westminster after last Easter Term, when the following facts appeared:—In August, 1859, the defendant, a solicitor, was employed by the deceased Alexander Edgell to sell an estate in Bedfordshire. The property was sold on the 24th of September following. It consisted of ten lots, nine of which were sold by auction, and one by private contract. The defendant received a deposit on the purchase-money of each lot, amounting in the whole to 1563*l.* 5*s.*, and gave receipts in which, as well as in the memorandum of agreement in each case, he described himself as "agent for the vendor." By the third condition of sale, it was provided that "the purchaser of each lot should immediately after the sale pay one guinea for the auctioneer and one guinea for the agreement, and also pay into the hands of Mr. G. Day (the defendant), *as agent for the vendor,* a deposit of 15*l.* per cent. upon and in part of the purchase-money, and sign an agreement for payment of the remainder thereof, and to complete the purchase thereof, on or before the 1st of November next, at the office of Mr. G. Day at

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St. Neots," &c.; and the memorandum of agreement, relating to the lot sold by private contract, described the sale as being made "subject to the annexed conditions so far as the same apply to a sale by private contract." Immediately after the deposits were made Mr. Edgell demanded the money so received by the defendant; but the latter declined to pay it over to him, claiming to be entitled to retain it until the purchases were completed. In consequence of certain Chancery proceedings, none of the purchases were completed till the year 1864, shortly before the commencement of the present action, and two of them were not completed at the time that the action was brought. The plaintiff, however, paid into court the whole sum deposited with him, with interest at 5 per cent. from the time of the completion of the different purchases.

It was contended, on the part of the plaintiff, that the deposits having been received by the defendant as the agent of Mr. Edgell, he was bound to hand over the money to him on demand. For the defendant it was insisted, that, though acting as solicitor for Mr. Edgell, he received the money in the character of a stakeholder, and was bound, like an auctioneer, to hold it until the completion of the purchase.

Under the direction of the learned judge, a verdict was entered for the plaintiff for 338*l.* 10*s.*, being interest at the rate of 5*l.* per cent. per annum on the deposits, from the time they were received to the time of the completion of the purchases respectively; leave being reserved to the defendant to enter a verdict for him, if the Court should be of opinion that the plaintiff was not under the circumstances entitled to such interest.

J. Brown, Q.C., in Trinity term last, obtained a rule nisi. He referred to *Wiggins* v. *Lord* (1) and *Wolfe* v. *Findlay* (2), and also to *Sugden's Vendors and Purchasers*, 14th ed. 50. He also moved to reduce the verdict, referring to the statute 16 & 17 Vict. c. 90; but on this the rule was refused, on the ground that the rate of interest was for the jury to determine.

Coleridge, Q.C., (Nov. 9th) shewed cause. The question is whether the defendant ought to have paid the deposit-money

(1) 4 Beav. 30. (2) 6 Hare, 66.

over to the plaintiff when it was first demanded of him, or was right in keeping it until the contract was completed, and this depends, upon whether he was a stakeholder or only the agent of the plaintiff. In the *Duke of Norfolk* v. *Worthy* (1), it was held that the principal was liable in an action for the deposit-money, the sale having gone off, even though it had not been paid over to him by the agent. Lord Ellenborough says, "When the deposit was lodged with the agent, this was in law *eo instanti* a payment to the principal." In *Bamford* v. *Shuttleworth* (2), in which the circumstances were similar to the present, it was decided that the attorney of the vendor was not a stakeholder, but only the vendor's agent. In *Harington* v. *Hoggart* (3), which decided that an auctioneer holds the deposits paid to him as a stakeholder, and is entitled to retain any interest which he may have received for the money while in his hands, the case of *Rogers* v. *Boehm* (4) is quoted and approved, in which an agent was held liable for the interest which he had received on money paid to him for his principal. The defendant in this case is in fact disputing the title of his principal, and this it is clear he cannot do, *Dixon* v. *Hamond*. (5) The case of *Wiggins* v. *Lord* (6) is distinguishable; there, the persons receiving the deposit, though they are stated to have been the solicitors for the vendor, are not described as such in the contract; and the very words of the contract, "that a deposit of 30*l*. should be *paid into the hands* of Messrs. Harris and Wise," seem to shew that it was intended to constitute them stakeholders.

[BYLES, J. They may have been solicitors for both parties.]

In *Edwards* v. *Hodding* (7), the defendant was a solicitor as well as auctioneer; but the money was paid to him as auctioneer. To hold the defendant not liable, would infringe the principle that an agent who receives money, as such, is not liable to third parties; see *Stephens* v. *Badcock* (8), and the cases cited in *Story on Agency*, s. 154.

J. Brown, Q.C. and *D. Brown*, in support of the rule. All the text-books agree that there is no distinction between an auctioneer

(1) 1 Camp. 337.
(2) 11 Ad. & E. 926.
(3) 1 B. & Ad. 577.
(4) 2 Esp. 702.
(5) 2 B. & A. 310.
(6) 4 Beav. 30.
(7) 5 Taunt. 815; 1 Marsh, 377.
(8) 3 B. & Ad. 354.

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and a solicitor, but that both are to be considered as stakeholders; *Sugden's Vendors and Purchasers*, 14th ed. 50; *Addison on Contracts*, 5th ed. 93; and such appears to be the universal understanding of the profession. In *The Duke of Norfolk* v. *Worthy* (1), the agent was not a solicitor. *Bamford* v. *Shuttleworth* (2), appears to be similar to the present case; but if so, it is at direct variance with *Wiggins* v. *Lord* (3), and the text-books.

[WILLES, J. In *Wiggins* v. *Lord* (3), the money was paid to the solicitor *nominatim*, and not as solicitor.]

ERLE, C.J. I am of opinion that this rule should be discharged. The action is brought by the vendor of an estate against the defendant, whom he employed as his solicitor on the sale of the property, and who, as such, received a sum of money by way of deposit, and claims to have been entitled to hold it until the completion of the purchase, insisting that he held the money as a stakeholder. The plaintiff, on the other hand, insists that the money was received by the defendant as his agent, and he seeks to recover the interest thereon from the time he demanded it to the completion of the purchase, when it was paid over to him. The question to be decided is, whether the defendant held the money in the capacity of stakeholder or in that of agent. Looking at the facts of the case, I think he clearly held it as agent. He made the contract as agent for the vendor, and he signed the receipt, describing himself as agent. All his authority was derived from the vendor, and he had no power to bind the purchaser, nor had he any authority from him. His position in no degree resembles that of an auctioneer, who acts as agent for both parties, and can bind the purchaser by his signature, and who, according to a series of decisions, is a stakeholder; and, as all persons are supposed to know the law, they are held to have contracted in that relation. The general principle of law is, that a payment of money to an agent is payment to the principal. *Bamford* v. *Shuttleworth* (2) is a direct authority of the Court of Queen's Bench, that the defendant must be considered as the plaintiff's agent; and though the case does not seem to have been noticed in the text-books, there it stands, and is, I think, perfectly sound in principle. I am well

(1) 1 Camp. 337. (2) 11 Ad. & E. 926. (3) 4 Beav. 30.

aware of the authority of *Sugden's Vendors and Purchasers*, but I think that his opinion on this point is not supported by the cases. Nor can I take notice of what is, as Mr. Brown says, the understanding of the profession. In cases in which the solicitor is acting for both parties, as he may have been in *Wiggins* v. *Lord* (1), it is possible that he may hold the deposit as agent for both of them, and then he will be a stakeholder; and so, if a man is an auctioneer as well as a solicitor, as was the case in *Edwards* v. *Hodding* (2), the fact that he is a solicitor will not at all vary his rights and liabilities as an auctioneer. It has been suggested that the purchaser may be deprived, by the decision we are pronouncing, of some security; but we cannot help that. If the solicitor is agent for the vendor only, he clearly owes no duty to the purchaser.

WILLES, J. I am of the same opinion upon all the points mentioned by my Lord. The defendant was clearly solicitor for the vendor, and for him only; and we see from the third condition of sale that the deposit was to be paid to him, as agent for the vendor, which seems to me the same as if it had been provided that the deposit should be paid into some bank to the account of the vendor. The plaintiff, therefore, is clearly entitled to the money.

BYLES, J. I am of the same opinion. I entirely repose on the words of the contract which the defendant makes *as agent for the vendor*, and on the receipt, in which he professes to have received the money *as agent*, which make the case of *Bamford* v. *Shuttleworth* (3) precisely in point. What might have been the case but for the use of those words need not be decided.

KEATING, J. I am of the same opinion. All the facts shew that the defendant acted entirely as agent for the vendor, and that he was not a mere stakeholder. It has been said that our decision will oblige purchasers to deposit their money with auctioneers instead of solicitors. I cannot see that this is so, because the purchaser can always convert the solicitor into a stakeholder, by dspositing the money with him on the terms that he shall hold it as such.

Rule discharged.

(1) 4 Beav. 30. (2) 5 Taunt. 815; 1 Marsh, 377.
(3) 11 A. & E. 926.

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[IN THE EXCHEQUER CHAMBER.]

BULLEN AND ANOTHER *v.* SHARP THE ELDER.

Partnership—Agency—Perception of profits—Marriage-settlement.

S., being about to commence business as an underwriter at Lloyd's, through the agency of one Fenn, in consideration of the defendant (the father of S.) engaging with Fenn to hold a sum of 5000*l.* available for his son for the purpose of carrying out the arrangement, gave the defendant the following memorandum:—"In consideration of your guaranteeing me to the extent of 5000*l.* in my business of underwriter, until by such business I shall make or acquire from the profits thereof 5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500*l.*, being equal to 10*l.* per cent. per annum on 5000*l.*; and, further, that, if at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years:" and the memorandum concluded with these words:—"moreover, in no case are you to be considered as a partner with me in the said business of an underwriter:"—

Held, by the Exchequer Chamber, in accordance with the judgment of the court of Common Pleas, that the above memorandum did not constitute the defendant a partner with his son.

By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., *as trustees*, "all and singular the sums of money, earnings, *profits*, and emoluments which are now in the hands of Fenn, and all such as shall hereafter come into the hands of Fenn, on account or in respect of the said underwriting business." The deed also contained a power of attorney authorizing the defendant and his co-trustee to receive *the whole proceeds of the business*; and the first trust was, to pay the defendant 500*l.* a-year, with an additional sum when the profits of the business should have realized a given sum, and a covenant, that, when the accumulated profits should have reached 8500*l.*, and continued at that amount without reduction for two years, the trustees should re-assign to S. "the said moneys and *profits* arising from the aforesaid underwriting business."

In an action upon a policy signed by Fenn in the name of S., a special case was stated in which were set out the above-mentioned memorandum and marriage-settlement, and by which it was agreed that the court should draw any reasonable inferences of fact:—*Held*, by the majority of the Exchequer Chamber,—reversing the judgment of the court below,—that the marriage-settlement did not, either alone or in conjunction with the memorandum, render the defendant liable as a partner with S. in his underwriting business.

Held, by *Pigott*, B., and *Shee*, J., that the effect of the settlement was, to give the defendant such a substantial interest in the business as to render him liable as an insurer on the policy.

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THIS was an action on a policy of insurance effected at Lloyd's for 2700*l.*, for twelve calendar months from the 22nd of December, 1859, upon the ship Shepherdess. The declaration alleged that the defendant, in consideration of a certain premium paid to him by the plaintiffs, "subscribed the said policy for 100*l.*, and became an insurer thereon to the plaintiffs for that amount." The defendant pleaded, amongst other pleas,—secondly, that he did not subscribe the policy, or become an insurer thereon, as alleged,—sixthly, never indebted. Issue thereon.

At the trial before Erle, C.J., at the sittings at Guildhall after Michaelmas Term, 1864, a verdict was taken for the plaintiffs, by consent, for 100*l.*, subject to a special case, which stated in substance as follows:—

1. In the beginning of 1857, the defendant applied to one Fenn, an underwriter at Lloyd's to introduce the defendant's son, William Sharp jun., to Lloyd's, with a view to his becoming a member of that body. Fenn shortly afterwards told the defendant that he had been before the committee at Lloyd's, and that they had suggested that the defendant should give a guarantee for the liabilities to be incurred by his son. This the defendant objected to do, but stated that he might not be unwilling to give his guarantee for a limited amount.

2. Fenn thereupon, on the 27th of March, 1857, sent the committee of Lloyd's the following letter:—

"Gentlemen,—I have communicated to Mr. W. Sharp, senior, your requirements as to his son's admittance as a member of Lloyd's, and he tells me that he has such a strong repugnance against guarantees, that he is willing to place at my disposal 5000*l.* (instead of 3000*l.*), if this meets with your approval. I can further add that he (Mr. S.) assures me that he would never let his son stand in need of further aid, if required."

3. On receipt of this letter, the committee of Lloyd's elected the defendant's son, William Sharp jun., a member of Lloyd's.

4. At the same time, the defendant's son entered into an agreement with Fenn, for him to transact the son's underwriting business for a period of three years, of which the following is a copy:—

"Memorandum of agreement made and entered into the 17th of March, 1857, between W. Sharp, junior, of &c., of the one

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part, and W. Fenn, of Lloyd's, underwriter, of the other part: Whereas, it hath been agreed between the said parties that an underwriting account at Lloyd's Coffee-House, London, shall be opened and carried on in the name of the said W. Sharp, under the management and superintendence of the said W. Fenn, for the time and upon the terms and conditions hereinafter mentioned, that is to say:—

"1st. That, as far as practicable, all risks taken on account of the said W. Sharp, shall be identical with those taken by the said W. Fenn on his own account; and that the exceptions, or single lines, shall be taken, as far as practicable, alternately by the said W. Sharp and W. Fenn, if the said W. Sharp shall require it.

"2nd. That the underwriting account shall commence on the 18th of March, 1857, and shall be carried on and the subscription be made in the name of the said W. Sharp; but the policies, losses, and averages shall and may be adjusted by the said W. Fenn on his own account.

"3rd. That the said W. Sharp shall apply so much of his attention and time to the purposes of the said business as may be essential to him; and the said W. Fenn shall apply such part of his time and attention to the business as may be required for conducting the same; but he is not to be precluded from carrying on the said business as an underwriter in his own name and on his own account.

"4th. That the said underwriting business shall be carried on for the term of three years from the 1st of March, 1857, after which the said business may be determined either by the said W. Sharp or W. Fenn, on giving three months' notice to the other, or leaving the same at his usual or then last known place of abode in England; upon the expiration of which notice, the said business shall cease and determine, and the accounts thereof be settled and wound up.

"5th. That proper books of account, and all securities, letters, and documents relating to the said business shall be kept by the said W. Fenn at his counting-house, and proper entries made therein of all such insurances, transactions, and things as are usually written and entered in books of account kept by persons

engaged in concerns of a similar nature; and that each of the parties shall have free access to inspect, cast up, examine, and copy out the same, without any hindrance or denial of or by the other of them.

"6th. That all the premiums and other moneys arising or payable in respect of the said business shall be received by the said W. Fenn, and paid to the account of the said W. Sharp at his bankers' during the said term; and all payments and advances in respect thereof shall be made and paid by him exclusively, the said W. Sharp providing the necessary funds for the purpose.

"7th. That the said W. Fenn shall during the said term be paid and allowed a salary of 300*l.* per annum, by quarterly instalments, on, &c.

"8th. That the said W. Fenn engages to give such underwriting business his best care and attention.

"9th. That, after the expiration of this agreement, the said W. Fenn shall, if required, attend to the winding-up of the said account, and the adjusting and settling of losses thereunder; but the said salary shall cease at the expiration of the said term of three years, or the determination of the said underwriting account, if continued beyond that period.

"10th. That no risk is to be taken by the said W. Sharp personally during the continuance of this agreement, without the consent of the said W. Fenn. In witness," &c.

(Signed) "William Fenn.
"William Sharp, Junior."

5. Under this agreement, the underwriting business of the son, Sharp jun., was carried on by Fenn until the agreement was altered in November, 1858, as hereinafter mentioned. Fenn subscribed all policies of insurance for the son, in the name of the son.

6. On the 20th of May, 1857, Fenn received from Lloyd's committee the following letter, signed by G. A. Halsted, their secretary:—

"Lloyd's, 20th May, 1857.

"Sir,—I am directed by the committee for managing the affairs of Lloyd's to request that you will be good enough to inform

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them, with reference to your letter of the 17th March, whether the 5000*l.* that you therein mentioned would be placed at your disposal by Mr. Sharp sen. for the benefit of his son's account, has been so appropriated."

7. Fenn having communicated this letter to the defendant, the latter wrote the following letter to Fenn:—

"May 21st, 1857.

"My dear Sir,—In order that you may satisfactorily answer the question put to you by the committee at Lloyd's relative to your having at your disposal the 5000*l.* you represented my son to possess when you proposed him for admission at Lloyd's, I have to inform you that I hold that sum for him, and engage that it shall be freely available for the purpose of carrying out the arrangement he has made with you to conduct for him an underwriting account.

(Signed) "W. Sharp."

8. On receipt of this, Fenn sent the following answer to the committee of Lloyd's; but such letter was not seen by the defendant, nor was he aware of the contents:—

"May 22nd, 1857.

"Gentlemen,—In reply to yours of the 20th inst., I beg to inform you that I have the 5000*l.* for the use of Mr. W. Sharp jun., which for my own interest I took care to secure: and I have a further assurance, that, if more should be wanted, I shall not be without funds."

9. The underwriting business carried on by Fenn for the son having proved profitable, the son, in November, 1858, with the defendant's concurrence, entered into an agreement with Fenn for extending the business, by increasing the amount of the risk usually taken by the son on policies of insurance.

10. The following is a copy of this agreement:—"The undersigned do hereby agree, this 1st November, 1858, that, from and after the 1st day of November, 1858, and so long as the said W. Sharp shall require it, the said W. Fenn shall write double, or increase the lines for and on account of the said W. Sharp, in all practicable cases; and, in consideration thereof, the said W. Sharp shall pay the said W. Fenn an additional 50*l.* per quarter so long as the said W. Sharp requires the said W. Fenn to write double or increased lines. That the said W. Fenn and W. Sharp agree to

extend the agreement of the 17th of March, 1857, to the 31st of December, 1864, the same remaining in force except as altered as above."

11. Shortly after and in consequence of this arrangement, the son wrote the following letter to the defendant:—"In consideration of your guaranteeing me to the extent of 5000*l.* in my business of an underwriter, until by such business I shall make or acquire from the profits thereof the full and clear sum of 5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, but not otherwise, an annuity of 500*l.*, being equal to 10 per cent. per annum on the sum of 5000*l.*; this annuity to be paid, without any deduction, except on account of income-tax, by equal half-yearly payments, on &c. And, further, that, if at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, then and in that case the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years; the said increased annuity to be paid, without deduction, except as aforesaid, by equal half-yearly payments on the days above named, &c.; and, moreover, in no case are you to be considered as a partner with me in the said business of an underwriter. London, 1st January, 1859."

12. In July, 1859, a further agreement was made between Sharp jun. and Fenn, of which the following is a copy:—

"Memorandum: It is mutually agreed between the undersigned that the above agreement of the 17th of March, 1857, shall be continued until the 31st of December, 1870, subject to the sooner determination thereof, after the 31st of December, 1864, by the said W. Sharp the younger giving the said W. Fenn six months' notice. London, 2nd July, 1859.

(Signed) "W. Fenn.

"W. Sharp, jun."

13. Under the above agreements, Fenn carried on the underwriting business for Sharp jun. until and at the time of the making of the policy on which this action is brought.

14. In August, 1859, the defendant's son, W. Sharp jun., married

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a Miss Chamney; and, on the occasion of his marriage, a deed of settlement was made and executed by and between Sharp jun., Miss Chamney, the defendant, and John Donnison, a copy of which was annexed to and to be taken as part of the case. (1)

15. This deed recites the several agreements between Sharp jun. and Fenn, above set forth, and the defendant's letter to Fenn of May 21st, 1857, and the letter of Sharp jun. to the defendant of January 1st, 1859, promising the annuity above mentioned. It also recites the intended marriage, and that, in contemplation thereof, it had been agreed that Sharp jun. should assign to Sharp sen. and John Donnison all moneys then in the hands and thereafter to come into the hands of Fenn in respect of the aforesaid underwriting business, on behalf and for the benefit of Sharp jun., and should also transfer to them stock being of the nominal value of 1000*l.* in the London and North Western railway, and stock being of the nominal value of 500*l.* in the London and South Western railway, and should likewise assign to them the policy of assurance thereinafter mentioned on the life of Sharp jun. for the sum of 3000*l.*, to be held respectively by them upon the trusts and for the intents and purposes thereinafter expressed; and that, in pursuance of the said agreement, Sharp jun. did previously to the execution of the said deed transfer all the said railway-stock into the names of the said Sharp sen. and John Donnison in the share register books of the said railway companies respectively, to be held in trust for Sharp jun. until the solemnization of the said intended marriage, and, after the solemnization thereof, upon the trusts and for the intents and purposes thereinafter declared and expressed concerning the same. The deed then witnesses, that, for the considerations therein mentioned, Sharp jun. assigned to the defendant and Donnison all and singular the sums of money, earnings, profits, and emoluments which were then in the hands of Fenn, and all such as should come into the hands of Fenn on account or in respect of the underwriting business, and which according to the terms of the said agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2nd of the then present month of July, respectively, or otherwise, were, or

(1) See the deed fully set out in the report of the case in the court below, 18 C. B. (N. S.) 626, n.

would, or might become payable to the said Sharp jun., together with full power and authority to and for Sharp sen. and Donnison and the survivor of them, and the executors or administrators of such survivor, in the name or names and as the attorneys or attorney of the said Sharp jun. to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for the said moneys, proceeds, and premises expressed and intended to be thereby assigned, and every or any part thereof: and Sharp jun. did thereby order and direct Fenn and other the agent, deputy, and attorney for the time being of the said Sharp jun. in the aforesaid business, to pay the said moneys, profits, and premises unto Sharp sen. and Donnison, their executors, administrators, and assigns, accordingly, To have and to hold the said moneys, profits, and other the premises thereinbefore mentioned and thereby granted and assigned, or expressed and intended so to be, unto Sharp sen. and Donnison, their executors, &c., In trust, nevertheless, for Sharp jun. until the said intended marriage between him and the said M. Chamney should be solemnized; and, from and after the solemnization thereof, upon the trusts and for the intents and purposes thereinafter declared and expressed concerning the same, that is to say, Upon trust with and out of the moneys and profits arising from the said underwriting business, in the first place to pay unto Sharp sen., by half-yearly payments, on &c., the annuity or yearly sum agreed or undertaken to be paid by Sharp jun. to Sharp sen. by the said thereinbefore-recited memorandum or writing under the hand of the said Sharp jun., dated the 1st of January, 1859; and, subject and without prejudice to the payment of the aforesaid annuity or yearly sum to the said Sharp sen., upon trust in the next place, with and out of the said moneys, profits, and premises, to pay to the said Sharp jun., by equal half-yearly payments on the days above mentioned, &c., an annuity or yearly sum of 500*l.*, free from all deductions; and also upon trust to pay to him when and as the same became due the dividends, interest, and annual proceeds of the aforesaid railway shares, and also the resulting income of the surplus moneys, profits, and premises to be accumulated and invested as thereinafter directed; And upon further trust to accumulate and invest in manner thereinafter expressed the residue or surplus after the payments afore-

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said of the said moneys, profits, and premises thereinbefore assigned, until the same should amount to or be of the value of 3500*l.* sterling, and should remain of that amount or value, without reduction on account of losses in the aforesaid underwriting business, for the full term of two years; and, from and after the time when the said accumulations amount to and remain for two years of the amount or value of 3500*l.* without reduction as aforesaid, then upon trust with and out of the proceeds of the said underwriting business to pay unto the said W. Sharp jun., by such half-yearly payments as aforesaid, an annuity or yearly sum of 750*l.*, free from all deductions, in addition to the income of the said accumulations and of the dividends and annual proceeds of the said railway shares, and to accumulate and invest in manner thereinafter expressed the residue or surplus, after the payments thereinbefore mentioned, of the profits of the said underwriting business, until the same should amount to or be of the value of 8500*l.* sterling, and should remain of that amount or value without reduction on account of losses as aforesaid for the full term of two years; and, from and after the time when the said accumulations should amount to and remain for two years of the amount or value of 8500*l.* without reduction as aforesaid, then upon trust to re-assign the said moneys and profits arising from the aforesaid underwriting business unto the said W. Sharp jun., his executors, &c., absolutely.

16. The deed contained other provisions, more or less material, for which reference was made to the copy.

17. After the marriage, the said deed of settlement was acted on by the defendant and Donnison, the trustees mentioned therein. Considerable losses were made in the underwriting business of Sharp jun. after his marriage, on policies signed in his name by Fenn under the above agreements; and the defendant, being called upon by Fenn, under his (the defendant's) letter of the 21st of May, 1857, made advances of money to Fenn to a considerable amount to meet the losses so sustained. The underwriting business was carried on by Fenn, as above mentioned, in the name of Sharp jun., until the 19th of February, 1860, when Sharp jun. stopped payment; and, on the 29th of March, 1860, he was made bankrupt.

18. Sharp jun. did not keep any banking-account. Fenn received and paid all moneys for him in respect of the underwriting business, and gave him cheques from time to time for such sums as Sharp jun. drew out of the business. These cheques were paid by Sharp jun. into the defendant's banking-account with Hankey & Co., on whom the defendant allowed him to draw cheques until November, 1859, when the defendant put a stop to his son's drawing cheques.

19. Fenn drew his salary out of the underwriting business.

20. The first half-yearly payment of the annuity of 500*l.* a year secured to the defendant by the said marriage-settlement, became due to the defendant on the 1st of January, 1860, and was paid to the defendant by Sharp jun. on the 7th of March, 1860, but has since been claimed by the assignees under the son's bankruptcy from the defendant, as an undue preference, and re-paid by him.

21. Sharp jun. between the date of his said settlement and his bankruptcy drew various sums of money out of the underwriting business, on account of the annuity of 500*l.* secured to him by the said settlement.

22. On the 22nd of December, 1859, the plaintiffs effected a marine policy of assurance at Lloyd's, in the usual way, for the sum of 2700*l.*, on the ship Shepherdess, for twelve calendar months, in any trade, and from and to any port or ports, commencing sailing from Whampoa, at eight guineas per cent. premium. This policy (a copy of which was annexed to the case) was subscribed by several underwriters, for various sums, as therein appeared, and, amongst others, by a clerk in the name of Sharp jun. before he stopped payment, for 100*l.* A loss afterwards occurred upon the policy to the plaintiffs, by the perils insured against, to the amount of 100 per cent.; and it was agreed that the underwriters to the policy were liable to the plaintiffs thereon to that amount.

23. The plaintiffs were wholly ignorant of the aforesaid arrangements and dealings between the defendant, his son, Fenn, and the committee of Lloyd's, and also of the said marriage-settlement.

24. In September, 1861, the plaintiffs proved their claim under

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Sharp jun.'s bankruptcy. A copy of the affidavit filed in support of the proof accompanied and was to form part of the case. At the time of such proof, neither of the plaintiffs was aware of the aforesaid arrangements and dealings.

25. The plaintiffs contended that the defendant, by the effect of the instruments and facts above mentioned, became a partner or a principal in the underwriting business carried on in his son's name as above mentioned, and as such a party to the policy and liable to pay to the plaintiffs the loss sustained on the policy in respect of the sum of 100*l.* underwritten in the son's name as aforesaid. The defendant contended the contrary. It was agreed that the court might draw any reasonable inferences of fact.

The question for the opinion of the court was,—whether the defendant was or was not liable on the said policy as a partner with his son.

If the court should be of opinion that the defendant was liable, then it was agreed that judgment should be entered for the plaintiffs for 100*l.* If the court should be of the contrary opinion, then it was agreed that the verdict and judgment should be entered for the defendant on the issues joined on the second and sixth pleas.

The court of Common Pleas,—consisting of Erle, C.J., and Byles, Keating, and Montague Smith, JJ.,—held that the memorandum of the 1st of January, 1859, and the marriage-settlement, taken together, shewed that the defendant had such an interest in the underwriting business of his son as to render him liable as a partner therein: see 18 C. B. (N.S.) 614; 34 L. J. (C. P.) 174.

The case was argued in the Exchequer Chamber, at the sittings in error after last Trinity Term, before Pollock, C.B., Crompton, J., Bramwell and Channell, BB., Blackburn, J., Pigott, B., and Shee, J., by *Lush, Q.C.* (*Mellish, Q.C.*, and *Sir G. Honyman*, with him), for the plaintiff in error, and by *J. Brown, Q.C.* (*Bovill, Q.C.*, with him), for the defendants in error.

The arguments urged and the cases cited were substantially the same as those already urged and cited in the court below: and the court took time to consider.

Cur. adv. vult.

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The judges not being unanimous, their judgments were now delivered seriatim, as follows (1):—

SHEE, J. The question in this case is, whether, when the policy on which the action is brought was effected, the underwriting business carried on in the name of William Sharp the younger was in fact the business of the defendant, or of the defendant in partnership with William Sharp the younger,—in other words, whether the policy underwritten by William Sharp the younger was underwritten by him, acting on behalf of the defendant, and as his agent.

The establishment of William Sharp the younger in his underwriting business at Lloyd's was permitted by the committee of Lloyd's on an assurance given to them by Fenn, acting as agent for William Sharp the younger, but with the authority of the defendant, who had refused to give a formal guarantee, that the defendant would advance to William Sharp the younger a capital of 5000*l.*, and never let him stand for want of further aid, if needed.

The committee, after William Sharp the younger had on that assurance been admitted a member, inquired of Fenn, by their secretary's letter of the 20th of May, 1857, if the money had been advanced; and Fenn, in answer to that inquiry, by the use, in his letter of the 22nd of May, 1857, of language more studiously than scrupulously chosen, had led them to believe that the 5000*l.* had in fact been advanced, and was in his hands.

The defendant, William Sharp the younger, and Fenn seem to have considered that the assurance given to the committee of Lloyd's was, although the defendant had refused a guarantee, an engagement binding in honour upon him, and virtually, as between him and the committee, an undertaking to the extent of 5000*l.* for the underwriting losses of William Sharp the younger.

Treating, apparently, this assurance of the defendant to the committee that he would advance 5000*l.* as equivalent to, or good security for, the actual advance of it, William Sharp the younger had agreed to pay to the defendant during their joint lives 10 per

(1) The late Mr. Justice Crompton was understood to have prepared a judgment in conformity with the opinions of the majority of the court; but, he having died in the interim, none was delivered.

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cent. per annum upon that amount, and in lieu of it, after the expiration of three years, one fourth of the average profits realized by the business during those three years, should that fourth amount to more than 500*l.*

Thus far, we have the defendant establishing his son in a business to be carried on by his son or his son's agent, Fenn, for his son's benefit,—the defendant guarding himself, should the business become unprosperous, against eventual loss under his promise to advance 5000*l.*, by a stipulation that he should receive a fixed annuity of 500*l.*, to commence immediately, and to be increased contingently to a fourth of the annual profits, should they average during the next three years more than that sum.

There is nothing before us which points to any source other than the underwriting business out of which this 500*l.* annuity could flow: but it was to be payable half-yearly, and to commence at the expiration of the first half-year after the date of the agreement to pay it, whether profits were made or not, in consideration of the defendant's promise to advance 5000*l.*, to be applied, should need be, to the discharge of debts which might be incurred in the underwriting business. Though fixed, therefore, apparently on an estimate of the probable amount of profits, and to increase with an increase of profits, it was not necessarily, or even probably, in the first instance, payable out of profits; and, regard being had to the consideration for it, was not within, or was barely within, the mischief to prevent which the sharing of the profits of a business has been considered in many cases as cogent though not conclusive evidence of a partnership, and liability for its debts.

Whether the 500*l.* annuity was in fact paid to the defendant out of the profits of the business or not, the defendant would not, rebus sic stantibus, have been liable for its debts. The definition of a partnership,—"Contractus consensualis de re vel operis communicandis lucri in commune faciendi causâ (1),"—was not satisfied by the relation between him and his son. They did not intend to be partners; and the business was not carried on by the defendant or by any person on his behalf, in partnership or not in partnership with him.

This state of things, however, was materially altered under the

(1) L. 63, pr. ff. De Societate.

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marriage-settlement, after the marriage of William Sharp the younger. Fenn, who up to that time had carried on the business, as agent of William Sharp the younger, accounting to him for its proceeds, at a salary payable by him, became in my judgment the agent to hold the proceeds of, and the means of carrying on, the underwriting business, and the agent to carry on the underwriting business for the defendant and John Donnison, to whom, besides other property of William Sharp the younger, all moneys belonging to him in the hands of Fenn, and all moneys, earnings, profits, and emoluments thereafter to come into Fenn's hands on account or in respect of the underwriting business, including, as I read it, any claim which William Sharp the younger might have had on the 5000*l.* advance, were, with full power and authority to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for, the said moneys, proceeds, and premises, assigned in trust for William Sharp the younger until his marriage,—in trust, after his marriage, primarily, and solely should the profits not exceed 500*l.*, to pay that sum annually out of the proceeds of the underwriting business to the defendant,—in further trust, but without prejudice to the defendant's annuity, to pay William Sharp the younger an annuity of 500*l.*, and, after the continuance for two years of an accumulation of profits to the extent of 3500*l.*, an annuity of 750*l.*, together with interest on the sum accumulated and the proceeds and dividends of other the property assigned,—in further trust, when the accumulation of profits should have arrived and for two years continued at 8500*l.*, to apply that accumulation to the emergencies of the underwriting business and the repayment to the defendant of any moneys he might have advanced under his guarantee of the 21st of May, 1857,—in further trust for all the purposes of a family settlement, and to provide for the intended wife of William Sharp the younger, and for his and her children.

Previously to the date of the marriage, unless we assume, which there seems no ground for doing, the whole scheme to have been illusory and collusive from its inception, the defendant had no more to do with the carrying on by himself or his agent of the underwriting business than Cox or Wheatcroft, in the case of *Cox*

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v. *Hickman* (1), had in carrying on of the business of the new firm of "The Stanton Iron Company" for the benefit of the creditors of the old firm of Smith & Co. After the date of the marriage, the defendant had as much to do with the carrying on of the underwriting business as the trustees in *Cox* v. *Hickman* had in carrying on by any agents they might employ the business of the Stanton Iron Company for the benefit of the creditors of Smith & Co. The business of the Stanton Iron Company, in *Cox* v. *Hickman*, was the business of the trustees, carried on by them for objects with which the parties dealing with them had no concern: the trustees were therefore held liable for its debts.

In this case, the underwriting business had become the business of the defendant and John Donnison, and they, as I think, had become liable for its debts,—not because they shared the profits, which one of them did not share, but because it was their business, carried on for them with their funds, by Fenn as their agent, in the name of William Sharp the younger, at a salary to be paid to Fenn by himself out of their capital which he held, or out of profits which he made for them.

That the business was carried on in the name of William Sharp the younger, and partly by him, and probably for his ultimate benefit, is, as respects the liability of the defendant, a circumstance wholly immaterial; the material and governing circumstance is, that the business which before the marriage was carried on by Fenn as agent for William Sharp the younger, he being the owner of all the moneys, earnings, profits, and emoluments derived from it, was after the marriage carried on by Fenn as agent for and on behalf of the defendant and John Donnison, to whom by the marriage-settlement all the moneys belonging to the business in Fenn's hands, and all the earnings, profits, and emoluments of it thereafter to come into his hands, and all the benefit of antecedent arrangements between the defendant, Fenn, and Sharp the younger, were assigned. The mode of conducting the business, and the relation between Fenn, who in fact conducted the business, and William Sharp the younger, were in other respects much changed after his marriage.

Before his marriage, William Sharp the younger had, or, if he had

(1) 8 H. L. C. 268.

not (as to which some doubt may arise on the terms of paragraph 18 of the case), was entitled under his agreement with Fenn of the 17th of March, 1857, to have an account with a banker into which the premiums and other moneys received by Fenn in respect of the underwriting business were to be paid, William Sharp the younger supplying Fenn with the necessary funds to make all payments and advances in respect thereof. After his marriage, William Sharp the younger kept no banking account; Fenn giving him cheques from time to time for the sums which he was allowed to draw, *i.e.* which were drawn for his purposes out of the business, such cheques being paid by Sharp the younger into the defendant's banking account with Messrs. Hankey, on whom the defendant permitted William Sharp the younger to draw cheques until November, 1859, when the defendant put a stop to his son's drawing cheques.

Before the marriage, under the agreement of the 17th of March, 1857, the salary of Fenn was to be paid by William Sharp the younger, who alone under that agreement was liable to Fenn for it. After the marriage, Fenn drew his salary out of the funds of the underwriting business, with the sanction and authority of the defendant and John Donnison, to whom the funds had been assigned, and to whom Fenn was accountable for them. Add these facts to the fact of the original restriction, which was never relaxed, upon William Sharp the younger taking any risk without the consent of Fenn, and to the fact that Fenn, who before the marriage-settlement had held all the moneys, earnings, profits, and emoluments of the underwriting business which came to his hands as agent for William Sharp the younger, held them after the marriage-settlement for the trustees of it, and the absolute nullity of William Sharp the younger as a principal, though held out as such, in the carrying on of the business from the date of the marriage, and at the date of the policy sued on, will be manifest. The position, as between him, the defendant, and Fenn, was little better than that of an under clerk, whose part it was to pretend to be a principal at Lloyd's, and underwrite such policies as Fenn told him to underwrite.

We must look at the substance of the new arrangement; and it seems to me impossible, though there was no formal attornment,

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to dispute that a man who, holding as manager of a business, and agent for the owner of it, the funds of the business, consents, under an arrangement to which the owner of the business is a party, to continue to manage the business and to hold the funds of the business in his hands, and which may thereafter come into his hands, for a third person as the assignee of the former owner of them, and to take his salary for the future out of those funds, becomes the agent of such third person.

There is nothing in the statement before us which renders it necessary, if we affirm the judgment of the court of Common Pleas, to impute any greater blame to the defendant than the blame which may be thought under such circumstances to attach to the fact of his defending this action. He had entered into an honorable engagement with the committee at Lloyd's to supply his son with funds to meet any losses he might sustain, to the extent of 5000*l.*, with a promise that he would never let his son stand in want of further aid, if needed: and, up to the date of his son's bankruptcy, he does not appear to have departed from the spirit and intention of that engagement. If he did not revoke it when the marriage-settlement was executed, or give notice to the committee at Lloyd's of the new arrangement then made, it may be fairly taken to have been because he intended at that time to assume the entire responsibility of the business. He has probably since his son's bankruptcy been induced to hope that, because the defendants in *Cox* v. *Hickman* (1), though they shared in an indirect and exceptional way, as the only means open to them of mitigating a loss already sustained, the profits of "The Stanton Iron Company," were held not liable for its debts, the defendant here, though he shared under a voluntary and express agreement to share, and in the plain and ordinary sense of sharing, and with the advantage of an absolute preference and priority, the profits of the underwriting business, might also escape liability. His advisers have not adverted to the fact that the defendants in *Cox* v. *Hickman* (1) did not, and that he the defendant in this case did, through an agent appointed and paid by him, carry on the business out of which the profits which he shared, and which in a very probable state of things he was entitled to engross, were made.

(1) 8 H. L. C. 268.

In the course of the argument, much as it seems of undeserved disparagement was bestowed upon the case of *Waugh* v. *Carver* (1) and other cases decided by learned judges of the highest authority, in which persons shewn to have been participators in the profits of a business have, in the absence of countervailing evidence, and on account of the great improbability that they to whom a business did not belong should be allowed by those who have the active management of it to take its profits, been held liable for its losses. The judgment of the House of Lords in the case of *Cox* v. *Hickman* (2) was treated as an unexpected manifestation of a concealed or forgotten principle at length happily discovered, and invoked for the correction of an obstinate error. But, in the cases which have been thus decried, the doctrine in *Cox* v. *Hickman* (2), that the law of partnership is but a branch of the law of principal and agent, does not appear to have been overlooked; nor, as is well explained in that case by Lord Cranworth, has a participation of profits, in determining the question of partnership liability as respects third parties, ever been relied upon, except for the purpose of assisting in the inquiry whether the person benefiting by the profits of a business was in truth, though not ostensibly, a principal on whose behalf by an agent it was carried on.

That the defendant, after his son's marriage, did in his son's name carry on the underwriting business, is, I think, the right inference to be drawn from the facts before us. In this view of them, the case of *Cox* v. *Hickman* (2), expressly recognized as sound by the court of Common Pleas in the judgment appealed against, is in favour of the plaintiffs: and that judgment ought in my opinion to be affirmed.

PIGOTT, B. This case comes before the court of error by way of appeal from the judgment of the court of Common Pleas: and the question raised by it is, whether the defendant is liable on a policy as a partner with his son, in whose name it was underwritten for 100*l*. The facts are stated; and the court is at liberty to draw any reasonable inferences from them. The effect of them seems to be as follows:—On the 17th of March, 1857, the defendant, through Fenn, an underwriter, got his son admitted as a member

(1) 2 H. Bl. 235. (2) 8 H. L. C. 268.

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at Lloyd's, upon a promise made to Fenn, to place at Fenn's disposal 5000*l.* "and further aid, if necessary." In May in the same year there was an agreement made between Sharp jun. and Fenn, as to the mode of carrying on the business. It contained ten heads of agreement; the material effect being that the subscriptions were to be in the name of Sharp jun., but the entire business to be transacted by Fenn at his counting-house, in the same way and to the same extent only as he acted on his own account. For these services Fenn was to be paid 300*l.* a year, and Sharp jun. stipulated that no risk was to be taken by him *without the consent of Fenn.* In May, 1857, three letters passed between Lloyd's committee, Fenn, and Sharp sen. They shew that Lloyd's committee were anxious to be assured that Sharp jun. really had the 5000*l.* Thereupon the defendant agreed with Fenn "to hold" that sum for his son as "freely available for his underwriting account." And Fenn informed the committee that "*he had* the 5000*l.* for the use of the son, with a further assurance of more funds, if necessary." And, in November, 1858, it was agreed by Fenn and Sharp jun. to extend the business by "writing double." "In consequence of this arrangement," it is said, Sharp jun. wrote to Sharp sen. (the defendant) a letter dated the 1st of January, 1859, agreeing, in consideration of his guarantee of 5000*l.*, to pay him an annuity of 500*l.* (with a possible increase at the end of three years, in case the business proved profitable to an extent mentioned), and stating in conclusion, that in no case was Sharp sen. to be considered a partner.

On the 2nd of July, 1859, there was a further agreement between Sharp jun. and Fenn, whereby Fenn's agency was to be continued till December, 1870, with power reserved to Sharp jun. to put an end to it after December, 1864, by six months' notice.

In August, 1859, on the marriage of Sharp jun., there was a deed of settlement executed, of which the defendant and John Donnison were made trustees. It recites the before-named agreements, and provides that "all the earnings, profits, and emoluments now in Fenn's hands, or which should thereafter come into them, are thereby assigned to the trustees,"—a power of attorney to them to sue and give discharges for the same being added. And Sharp jun. thereby also directs and orders Fenn

and other his agents for the time being in the business to pay all the moneys, earnings, and profits, to the trustees. The trusts are, —first, to pay Sharp senior's annuity under the agreement of the 1st of January, 1859; and next to pay Sharp jun. an annuity of 500*l.*; then to invest the profits till they amount to 3500*l.* and remain at that amount for two years; then to pay Sharp jun. 750*l.* instead of 500*l.* per annum; and, further, to accumulate the profits till they amount to 8500*l.* and remain at that amount for two years; then to re-assign the profits to Sharp jun. There is also a power to pay off the 5000*l.* with further trusts for the benefit of Sharp junior's family. Sharp jun. covenants also with the trustees, in case Fenn should die, to appoint immediately another competent person to act in the same capacity.

After this, Fenn continued to act as agent in carrying on the business. Sharp jun. had no banker. Fenn in fact received and paid all moneys, giving Sharp jun. cheques from time to time, which were taken by him and paid into the defendant's banking account at Messrs. Hankey & Co.'s; the defendant allowing him to draw cheques on his bankers till November, 1859, when he put a stop to his son's power of drawing cheques.

On the 22nd of December, 1859, the plaintiffs' policy was underwritten by Fenn's clerk in the son's name; and in February, 1860, Sharp jun. stopped payment. The case does not state whether any part of the guaranteed 5000*l.* still remains in the hands of Sharp sen.

Upon these facts, we are asked if the defendant is liable on this policy as a co-partner with his son.

The principle of the law applicable to the case is stated in *Cox* v. *Hickman* (1), in a very clear judgment of Lord Cranworth, thus:—"The real ground of liability (as a partner) is, that the trade has been carried on by persons acting on his behalf (that is, of the person sought to be made liable) so that he would stand in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." Now, applying this exposition of the law of partnership to the facts of the present case, I find that the contract in question is made by Fenn in Sharp

(1) 8 H. L. C. 268.

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junior's name; and the question therefore is, whose agent was Fenn? or, in other words, although apparently acting for Sharp jun. alone, was he really acting for both the Sharps? Now, the facts shew that the machinery was originally designed by Sharp sen.; that he set Fenn in motion to treat with Lloyd's committee for the son's admission there; that he found the whole capital, and was to provide more if necessary; that he tied up the actions of Sharp jun. by the agreement between him and Fenn, so that the son might be truly said to be in leading-strings as regards any management of the business. So far, the defendant had planned only the future conduct of the business. But then, in the course of it, we find that he is actively taking some, though it may be a slight part. For instance, it would be necessary that application should be from time to time made to him, as capital was wanted by Fenn. He would have to satisfy himself of the necessity of these advances, and to make them. Then, as he is expressly to receive all the proceeds under the settlement, and did so in fact at his bankers' from the commencement, this would necessarily involve him to some extent in the accounts of the business. But, beyond this, it is clear to my mind that the effect of the indefinite promise to give further aid beyond the 5000*l.* would be to keep in his own power a large control over the business and the agent; for, having regard to the large profits which were calculated upon in the settlement, it is manifest that further capital would be required; and the defendant's promise of further aid, being of the very vaguest kind, would be of no real binding obligation in law. When, therefore, further capital was wanted, it would rest with the defendant to advance it, or stop the business. But, beyond all these facts, the defendant, by the marriage-settlement, is the first (after deducting the agent's salary) to be paid out of the profits, and by possibility might engross them all. Now, this, though alone not the perfect test of partnership, yet it is still to be taken into consideration as one circumstance, with others; and, in Lord Cranworth's judgment, he says on the subject,—"A right to participate in profits affords cogent, often conclusive evidence that the trade in which the profits have been made was carried on in part for and on behalf of the person setting up such a claim." What, then, is the fair inference to draw from the foregoing facts? I think it is

clearly that the defendant is not a mere mortgagee of the profits, but a large sharer in them, with a control over the business, and, as I think, having a further interest,—that he had, in fact, a two-fold interest, the one consisting of the capital embarked and the return of ten (and possibly more) per cent. thereon, the other the object of advancing his son by establishing a business as underwriter; ultimately for the son's benefit, without incurring in course of doing so a risk of loss through his son's inexperience. Further, it seems to me that the son's position throughout points to the same conclusion; for, if the defendant is not a partner, it follows that the son is the only principal,—a supposition very difficult to reconcile with the following facts, viz. he would be a sole principal, yet not intrusted with either possession or disposition of one shilling of the entire capital of his business. Then, even assuming that he had nominated the agent, Fenn, he is bound to him for a long term of years, without the power of displacing him. He contracts with his own agent that he will not incur a risk in his own business without that agent's consent,—a term evidently imposed upon him by his father, it not being for the benefit of the other contracting party.

The result of the whole seems to me to be, that, by a circuitous mode, Fenn has been placed *by the defendant* in a position to carry on this business, with an intention on the defendant's part, doubtless, to allow his son to participate in the profits of it for a term, and ultimately, when established, and himself repaid, then for the benefit of his son altogether.

I do not, in coming to this conclusion, find it necessary to impute fraud to the defendant. The utmost to be urged against him is, that he has endeavoured (if the law will permit it) to carry on a business without making himself responsible for its losses as a partner. But (invoking again the language of Lord Cranworth) "this is no reason for holding him not to be liable, if on strict principles of mercantile law he is so." The difficulty mainly consists in the nature of the business, and the form in which the question is presented to the court. But, on the whole, it seems to be only a proper use of the power of drawing reasonable inferences, to say, as a matter of fact, that this business does appear to have been carried on on behalf of both the defendant

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and Sharp jun., and consequently that there is a partnership, with all the ordinary consequences of that relationship.

I therefore think that the judgment of the Common Pleas should be affirmed.

BLACKBURN, J. This was an action on a policy of insurance against the defendant as underwriter. The policy was actually underwritten in the name of the defendant's son. The question in the cause is, whether the defendant was a partner in the underwriting business carried on in his son's name, so as to make him liable to third persons on contracts made in the course of that business. On the trial, a verdict was taken by consent for the plaintiffs, subject to a special case, as part of which it was agreed that the court might draw any reasonable inferences of fact. The court below have determined the question in favour of the plaintiffs.

The case is brought before the court of Exchequer Chamber, under the 32nd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by which this court is required to give the same judgment as ought to have been given in the court below, and to draw any inferences of fact which the court below ought to have drawn. And, in the fulfilment of this duty, I have come to the conclusion that the judgment below ought to be reversed, as I think the defendant is not shewn to have been a partner in the business carried on in his son's name.

The case of *Cox* v. *Hickman* (1), being a decision of the House of Lords, the ultimate court of appeal, overrules all earlier authorities inconsistent with that decision, and, so far as the judgment goes, fixes the law in this country. We are not bound by all that is said in the course of a judgment of the House of Lords; but that which appears to be the rule established by the decision of that tribunal is binding, not only on all inferior tribunals in this country, but even on that House itself when sitting judicially.

In *Kilshaw* v. *Jukes* (2), there was a difference of opinion in the court of Queen's Bench as to the effect of the decision in *Cox* v. *Hickman* (1); Wightman, J., expressing an opinion that the circumstances of that case were so peculiar that the decision was

(1) 8 H. L. C. 268. (2) 3 B. & S. 847; 32 L. J. (Q. B.) 217.

hardly applicable to any other; whilst my Brother Mellor and I thought that the decision of the House of Lords was of general application. This case was referred to in the argument in the court below, but does not seem to have been much considered in any of the judgments. It seems, however, so far as we can collect from the reasons given by the different judges below, that they rather agreed with Wightman, J., than with the majority of the court of Queen's Bench.

The first point therefore to be determined in the present case, is, what really was the effect of the decision of the House of Lords in *Cox* v. *Hickman.* (1) Prior to that decision, the dictum of De Grey, C.J., in *Grace* v. *Smith* (2), "that every man who has a share of the profits of a trade ought also to bear a share of the loss," had been adopted as the ground of judgment in *Waugh* v. *Carver* (3), where it was laid down "that he who takes a moiety of all profits indefinitely shall, *by operation of law,* be made liable to losses if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." This decision had never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time: and when, more recently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. In *Cox* v. *Hickman* (1), the creditors of a trade had agreed that their debtor's trade should be carried on for the purpose of paying them their debts out of the profits; and the composition-deed, to which they were parties, secured to them a property in the profits. The rule laid down in *Waugh* v. *Carver* (3), if logically followed out, led to the conclusion that all the creditors who assented to this deed, and by so doing agreed to take the profits, were individually liable as partners: but, when it was sought to apply the rule to such an extreme case, it was questioned whether the rule itself was really established. There was a very great difference of opinion amongst the judges who decided the case in its various stages below, and

(1) 8 H. L. C. 268. (2) 2 W. Bl. 998.
(3) 2 H. Bl. 235.

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also amongst those consulted in the House of Lords. In the result, the House of Lords,—consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale, and Chelmsford,—unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth that we must look for the ratio decidendi. Now, we find Lord Cranworth says (1),—"It was argued, that, as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for, a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is, to say that the same thing which entitles him to the one makes him liable to the other, viz. the fact that the trade has been carried on on his behalf, *i.e.* that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only

(1) 8 H. L. C. 306.

that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case; for, without it, all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees: the debtor or the trustees are the persons by or on behalf of whom it is carried on." He afterwards adds (1),—"The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore he would stand in the position of principal towards the ostensible members of the firm as his agents." And Lord Wensleydale says (2),—"A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they shall carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other; and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence, it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on the subject, is only the consequence, not the cause why a man is made liable as a partner. Can we, then, collect from the trust-deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think

(1) 8 H. L. C. 309. (2) 8 H. L. C. 312.

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not." And he afterwards gives as the reason of his decision, that in the particular case, there was not "such a participation of profits as to constitute the relation of principal and agent between the creditors (the defendants) and the trustees, who actually made the contract sued on."

6 Ch D 306
30 S 315

I think that the ratio decidendi is, that the proposition laid down in *Waugh* v. *Carver* (1), viz. that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of *principal and agent* between the person taking the profits and those actually carrying on the business.

I do not think it is proper for us to inquire whether this rule of law is more or less expedient than the rule laid down in *Waugh* v. *Carver*. (1) That is a question for the legislature, who may alter the law as to them seems right. We have to only administer it, and to proceed to apply what we consider to be the judgment of the House of Lords to the facts in the present case.

The case contains a power to draw inferences of fact, and, therefore, it is open to the plaintiffs to contend that we should draw the inference that the transactions stated in the case were not really what they appear to be. I shall afterwards deal with the question how far I think such inferences ought to be drawn: at present, I shall consider the case on the supposition that the various transactions between the parties really were what they purport to be.

It appears, then, that, in March, 1857, the son of the defendant entered into a written agreement with one Fenn, an underwriter, which is set out in the fourth paragraph of the case. By this agreement, the son was to be an underwriter; but the management of the business was to be confided to Fenn, who, in consideration of a salary of 300*l.* a year, was to act for the son. On the same day on which this agreement was made, the defendant authorized

(1) 2 H. Bl. 235.

Fenn to state to the committee of Lloyd's that he, the defendant, had placed at Fenn's disposal 5000*l.*, and intended to give his son further aid, if needed. In November, 1858, it was resolved to extend the business carried on by Fenn in the name of the son; and, by an agreement between them, Fenn's salary was raised to 350*l.* On the 1st of January, 1859, the son signed a letter addressed to the defendant, which is set out in paragraph 11 of the case. By it, in consideration of the defendant's guaranteeing the son to the extent of 5000*l.* in his business of an underwriter until by such business he should acquire the clear sum of 5000*l.*, the son promised to pay the defendant during their joint lives an annuity of 500*l.* a year, to be increased in case one fourth of the son's average annual net profits during the first three years should exceed 500*l.*, to a sum equal to one fourth of such net average annual profits. This arrangement, as worded, would not increase the annuity, unless the son's average net profits during the first three years exceeded 2000*l.* a year; so that it would seem the parties contemplated carrying on a business much more extensive than was justified by a capital of 5000*l.*: and it is not very surprising to find, that, before the three years' end, the son was a bankrupt. It was expressly stipulated in the letter that the defendant should not be a partner with his son in his business. This last stipulation is binding between them, but does not affect third parties: and, consequently, the first question we have to determine, is, whether this agreement did constitute a partnership as to third parties. And I think, that, assuming it to represent the real transaction, it did not constitute a partnership. It is not an arrangement by which the defendant agrees to carry on the trade in the name of his son; nor even one in which he stipulates for a portion of the profits of that trade: but it is a purchase of an annuity, secured only by the personal promise of the son; the consideration being that the defendant binds himself to make advances to the son to the extent of 5000*l.*, when required in the business.

In August, 1859, the son married; and prior to his marriage he executed a deed of settlement, which is made a part of this case. This deed was between the son, of the first part, the intended wife, of the second part, and two trustees (of whom the defendant was one), of the third part. It recites the agreements between the son

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and Fenn for carrying on the son's business under the management of Fenn, and also the agreements between the son and the defendant by which the son bound himself to pay the defendant an annuity, and an agreement, in contemplation of the marriage, by which the son engaged to convey some railway shares and other property, and also all the proceeds of his underwriting business, to trustees, on certain trusts; and then the son does by the deed assign over to the trustees (one of whom is the defendant) all moneys the proceeds of the underwriting business then in the hands of Fenn or any other person who might be substituted as manager of the son's business, or thereafter so to be, and gave them a power of attorney to recover such moneys from the manager: and then the indenture declares the trusts on which the moneys are to be held. These are, in the first place, to pay the annuity to the defendant. Next, to pay the son an allowance of 500*l.* a year, to be increased, if the business prospered, to 750*l.* Then, to accumulate the surplus until it amounted to 8500*l.* and so remained for two years without reduction, when the engagement to pay over the future proceeds of the business to the trustees was to cease. There is a proviso, that, at any time during the continuance of the engagement, the trustees were, upon the request of the son, or his manager for the time being, to raise out of the property assigned by the son and the accumulated fund any sum required to meet emergencies occurring in the underwriting business. The ultimate trusts of the accumulated fund, when it should have remained two years without reduction at the sum of 8500*l.*, were, to repay any advances made by the defendant under his guarantee, and, subject thereto, for the benefit of the wife and children.

Such a settlement as this would be very inconvenient in most trades: but, when the peculiar nature of an underwriting business as carried on at Lloyd's is borne in mind, it seems a prudent enough arrangement. The course of business was stated in *Xenos* v. *Wickham* (1); and we were informed during the course of the argument that it was stated accurately. The premiums are received by the broker, and out of these losses and returns of premium are paid by him, the balance being paid over to the underwriter at stated intervals. So long, therefore, as the losses

(1) 14 C. B. (N.S.) 460; 33 L. J. (C.P.) 13.

do not exceed the ordinary and expected average, the underwriter only receives money. But, if the losses exceed the average, so that the whole premiums in the hands of the broker are absorbed by these losses, the underwriter has to find the funds to meet the excess; and it is to be anticipated that at irregular intervals such extraordinary losses will occur. The underwriter, therefore, ought not to spend the annual proceeds of his trade as if they were clear gain, but should keep a considerable reserve-fund. Now, if by a settlement an underwriter binds himself to his trustees to limit his personal expenditure, and to put the residue of the proceeds of the trade in their hands as a reserve-fund to meet the emergencies of his trade, and, subject to meeting those emergencies, to form a fund for the benefit of his family, he does but bind himself to do that which a prudent man ought to do of his own accord. It is true, that, by entering into this agreement, the trustees do take the profits of the trade; and, whilst *Waugh* v. *Carver* (1) was considered as unqualified law, it would have been difficult to say that they did not thereby by operation of law make themselves partners in the trade, and personally responsible; though it may be observed that they do not by this arrangement withdraw the profits from the reach of the creditors, but rather secure that the trader shall not spend them, and that they shall remain as a fund to meet emergencies. But, when we find that the object of their taking the profits of the trade, is, to keep them as a reserve-fund to meet the emergencies of the business, I think it becomes clear, that, though they take the profits, they do not cause the business to be carried on for them, and that the participation is not such as to constitute the relation of principal and surety between the trustees of the settlement and the underwriter: and that, according to *Cox* v. *Hickman* (2), is the true question. I think, therefore, that such a settlement does not of itself make the trustees partners in the business.

In the present case, the first trust was to pay the defendant his annuity; and it was argued, that, though his co-trustee, Donnison, might not be a partner or a principal in the underwriting business of the son, yet that the defendant, being not only a trustee, but also beneficially interested in the profits when received by him and his co-trustee, was a partner. But, if the previous arrangement

(1) 2 H. Bl. 235. (2) 8 H. L. C. 268.

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between the defendant and his son was really what it purported to be, and the defendant really was an annuity-creditor of his son, this arrangement goes no further than did that in *Cox* v. *Hickman*. (1) There is only one creditor, instead of many: but, in every other respect, the words of Lord Cranworth, already cited, are strictly applicable: "The debtor" (in this case, the son,) "is still the person solely interested in the profits, save only that he has transferred them" (or, in this case, a part of them,) "to his creditor, the defendant." The son receives the benefit of the profits as they accrue, though he has precluded himself from applying this portion of them to any other purpose than the payment of this annuity, for which he was already liable. The trade is not carried on by or on account of the annuitant-creditor. I think, therefore, that, assuming that the transactions were really what they purport to be, the defendant was not liable as a partner in the business carried on in his son's name.

I come now to consider whether, in the exercise of the power to draw reasonable inferences of fact, we ought to draw the inference, that, in reality, the transactions were not such as they purport to be, but that they were a cloak for a scheme by which the defendant really carried on the business for himself. This seems to have been the view of the matter taken by Byles, J., in the court below, and to have to some extent influenced the judgment of Chief Justice Erle: and I think that there was evidence which, had the case gone to the jury, must have been submitted to them in support of this view of the matter. The son was not intrusted with the management of his own business, which was confided entirely to Fenn: and the 5000*l.* which the defendant had stated was placed at Fenn's disposal was kept in the hands of the defendant; and the arrangement by which the father was to receive an annuity of 500*l.* a year is based on what seems to me a very exaggerated estimate of the probable profits of the business: and all this is evidence tending to shew that the original intention was that the business should be the father's, carried on for him and under his control. But these facts are also quite consistent with the supposition that there was a distrust of the son's steadiness and experience, and that, therefore, though he was started in

(1) 8 H. L. C. 268.

business on his own account, it was judged prudent to prevent his having for a time the full control of his business and his funds. And, on the point which presses most strongly against the defendant, viz. the taking what seems to me so large a return for his advances to the business, we are left in ignorance as to what are the usual rates of interest allowed for money employed in the business of an underwriter, or what profits might honestly be expected to arise from the business. On these points a jury would themselves probably have had some personal knowledge: we have none. They would also have had the benefit of hearing the evidence of the two Sharps and of Fenn, who might have been examined and cross-examined, and no doubt would have been so had the case gone to the jury.

It was urged by Mr. Lush, on the argument before us, that, when the parties, instead of going to a jury, agree that the facts shall be stated for the court, they do impliedly admit that there is no fraud or deceit in the matter; and that the power reserved to the court to draw inferences of fact should be understood as qualified by that implied admission. There is much force in this argument; and, without going so far as to say that the court should never draw an inference of fact that transactions stated in a special case were a colour and cloak to conceal something really different, I certainly think that no such inference should be drawn, unless it is very clearly made out. In the present case I think we are not justified in drawing any such inference.

For these reasons, I think that the judgment of the Common Pleas should be reversed.

The Chief Baron requests me to say that he concurs in this judgment, and it is to be considered as his as well as mine.

CHANNELL, B. The question for our decision in this case is, whether the defendant is liable on a policy of insurance. The policy was not subscribed by him, or in his name; and the defendant can only be liable upon it, on the ground that the policy was subscribed by some person acting as his agent, by authority express or to be implied from the defendant's conduct. If it were subscribed in the due course of the business of a partnership of which the defendant was a member, then the person subscribing

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would be the defendant's agent, and would derive his authority by operation of law from the existence of the partnership. In all cases, the reason for which a man is held to be liable as being a partner in a business, for contracts not personally entered into by him, is to be found in the fact of the relation of principal and agent being assumed to exist between partners. Whatever doubt the cases of *Grace* v. *Smith* (1) and *Waugh* v. *Carver* (2) may have given rise to, must be taken, I think, to be set at rest by the case of *Cox* v. *Hickman* (3), in the House of Lords. I agree with my Brother Blackburn in his remarks on that case, that we are not bound by every reason given by the learned Lords in delivering their opinions. Of course we are bound by the ratio decidendi. It is to be collected principally from the judgments of Lord Cranworth and Lord Wensleydale,—with whose opinions, however, the other learned lords who took part in the decision entirely agree. As my Brother Blackburn has cited at length the more important passages from the elaborate judgment of Lord Cranworth, and as I agree with my Brother Blackburn as to the ratio decidendi in that case, I content myself with saying that I adopt without repeating at length his reasons as to the effect of that decision. I think that henceforth we may take it that the true test, where a person is sought to be made liable on the ground of his being a partner, is, to see whether he has constituted the other alleged partner his agent in respect of the partnership business; and that, taking a part of the profits, though cogent evidence of this, is not conclusive. Mere participation in the profits is not sufficient to make a man bound by alleged partnership contracts, if the facts shew that he had not constituted the other his agent. Now, in the present case, taking the facts stated in the case to be the actual facts, I cannot see any agency constituted. It is clear, in the first place, that care was expressly taken that it should not be done; and certainly none can be implied from the conduct of the defendant, on the ground of his having held himself out as a partner, for, it is stated that the plaintiffs did not at the time of the insurance know the facts upon which it is now sought to make the defendant liable. In what other way, then, could authority be

(1) 2 W. Bl. 998. (2) 2 H. Bl. 235.
(3) 8 H. L. C. 268.

conferred? Only, as it seems to me, if the facts shewed that the business was really the business of the defendant, carried on for his benefit, and not for that of his son, or for his benefit together with that of his son. In that case, having accepted the benefit of contracts made on his behalf where beneficial, he would be precluded from repudiating the authority of the person making them where they proved unprofitable. Such a state of things does not, however, appear from the case, as the facts are there stated. It was the business of the defendant's son. The defendant received an annuity of 500*l.*, in consideration of his guarantee or advance of 5000*l.* If the business had prospered, the surplus would have gone to benefit the son; always assuming the facts stated to be the real facts, and not colourable. It is true that the defendant, as one of the trustees of the marriage-settlement referred to in the case, was to receive the profits: but, in considering the effect of this, we must look at the trusts of the deed and the nature of an underwriter's business. The trustees had not to manage the business, as the trustees of the creditors' deed in *Cox* v. *Hickman* (1) had: they had to apply the funds, first, in payment of 500*l.* a year to Sharp sen., the defendant. This, if we accept the statement in the case as to its origin, is a mere debt incurred by Sharp jun. in obtaining capital to start him in his business. So far, there is a mere mortgage of profits, which, according to *Cox* v. *Hickman* (1), will not make the mortgagee liable. Next, there is to be a payment of 500*l.* a year to Sharp jun., on which, I think, nothing turns, in considering the liability of Sharp sen. Then comes the trust for the accumulation or reserve-fund. This is to provide for the losses which in this particular business are to be expected in some years to exceed the profits, and which must be paid out of capital or accumulated profits of previous years. Can the fact that the profits are to be paid to the trustees for such a purpose as this make the business that of the trustees, any more than an agreement to pay them to a particular bank would make the bankers partners? If profits had been made, and the money accumulated, no doubt those funds could have been made available for the benefit of creditors; but the question here is, no profits having been made, can the acceptance by the trustees of the trust

(1) 8 H. L. C. 268.

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to take the profits and hold them for such a purpose, without any powers of management, make the business that of the trustees and carried on on their behalf? I think it cannot.

So far, upon the facts of the case, taking them to be precisely as stated. We have, however, power to draw inferences: and we are asked on behalf of the plaintiffs to draw the inference that the business was really the business of the defendant. I believe the difference of opinion which exists on the bench of this court is more as to the extent of this power, and the use we ought to make of it, than as to the law applicable to the case. The judgment of my Brother Byles in the court below was expressly founded on the inference drawn by him. Now, the view I take of such a power is, that, from the facts stated, we may draw any inference fairly arising as to other facts not stated: but I do not think we are at liberty for that purpose to vary the facts stated to us, and to infer that the facts stated are merely colourable, and the real transaction a different one. A jury may, of course, discredit any portion of the evidence before them, and, by doing so as to part of a case, they have a much wider range within which to find an interpretation to place upon it than we have under a mere power to draw inferences.

For the reasons which I have stated, and which are more fully explained by some of my learned Brothers, I think, taking the facts literally as stated, the plaintiffs have not made out the liability of the defendant. I see no inference fairly arising as to additional facts which would strengthen the plaintiffs' case; and I decline to draw the inference that the facts stated are merely colourable, and the business really that of the defendant. I therefore think the judgment ought to be reversed.

7 Ex. 232

BRAMWELL, B. In this case the plaintiffs declare that they made a policy of insurance, and that "the defendant, in consideration of a certain premium paid to him by the plaintiffs, subscribed the said policy for 100*l.*, and became an insurer thereon to the plaintiffs for that amount." The defendant pleads "that he did not subscribe the said policy or become an insurer, as alleged." And the question is, whether the plaintiffs have proved the allegation so traversed. This is the real and ultimate question;

because, though this, like other cases, has been argued as though *the* question were whether the defendant was a partner with somebody else, and though this way of arguing is reasonable enough, as primâ facie a partner is liable for the acts of his co-partner within the ordinary scope of partnership authority, yet, inasmuch as a man may be a partner and not liable, or not a partner and yet liable, the determination of partnership or no partnership does not settle the question which still remains,—"did the defendant subscribe the policy and become an insurer?" Now, he did not subscribe it with his own hand; nor is he liable on the ground of holding himself out as a partner or principal in this matter; for, he has not done so. The only other way in which he can be liable, is, by reason of his having given authority to the person who signed it so to sign and bind him. The person who did sign it is described in the case as a "clerk;" and he signed the name of the defendant's son. Then, did the defendant give that person any authority so to sign and bind him? That he did not in words, is certain: nor did he in intention; nor did the clerk intend to bind him; nor did his son, nor Fenn; nor did the plaintiffs suppose he was bound, or intend to deal with or trust him, but his son. If, then, he is liable, if he has given such authority, it is against the intentions of all parties; it is in spite of their meaning the contrary, and must therefore be from some force in the nature of the transaction itself. And this may be. If the defendant was really the principal, or one of the principals in the transaction; if those who acted really were his agents; if, on the truth appearing, he had a right to say the contract was made with him, and to enforce it,—he ought to be and would be liable. As, for instance, if there was a business which required the buying of goods on credit, and if a person tried to carry it on in the name of an agent, whether such agency was an agency of a partnership or any other, so that, upon the purchase of goods by the agent or partner, the property vested wholly or in part in the first-named person, then he would as it seems to me be liable, though he had stipulated with his agent or partner that he should not be; because he would have tried for an impossibility, for a thing repugnant in itself, viz. that the contract should be made with him, for his benefit, but not to bind him. It becomes necessary, then, to examine the facts.

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I think it not open to us to find that there is fraud, or that the arrangements were colourable. Questions of that character are essentially for a jury. We have power to draw only reasonable inferences. I think that does not extend to enable us to infer fraud. It is not intended to disable us from drawing unreasonable inferences, but from drawing inferences of matter which it would not be reasonable to leave to inference: and I think it would not be reasonable to leave to inference whether the apparent facts were the real facts, when the defendant and his son and Fenn have not been called as witnesses, and when we scarcely know anything that has taken place during the three years the business was carried on. Nor can I suppose such a thing is left to us, in face of the statement in the case that "the underwriting business of the *son* was carried on by Fenn" (par. 9),—and of that in par. 13, "Fenn carried on the underwriting business for Sharp jun. until and at the time of making the policy." At the same time, if I had to find whether the arrangement was fraudulent, or colourable, I should say it was not. I think the arrangements, though complicated, are intelligible, and such as might well be honestly made. The facts are as follows:—Fenn and Sharp jun. agreed in March, 1857, that Fenn should do an underwriter's business for Sharp jun. on certain terms. With this the defendant had nothing to do, except giving a guarantee to the extent of 5000*l*., not to find capital, which, I believe, is not needed in such a business, but to be liable to losses to that amount. He had no claim to profits, or in any way to meddle with the business. In November, 1858, "the business having proved profitable" (par. 9), a fresh arrangement was made between Fenn and Sharp jun., whereby the business was to be increased, and Fenn's salary also. On the occasion and in consequence of this, the defendant bargained with his son for an annuity for their joint lives of 500*l*., or of a sum equal to one fourth of the profits, if that fourth exceeded 500*l*. This may have been unfatherly and extortionate, as is said, if real, but clearly could not make the defendant a partner in or proprietor of the business. I don't say it was either extortionate or unfair. If the son was making large profits, he might well be able to pay the annuity; and the defendant ran the risk of that which has happened, viz. receiving nothing, and paying a great deal. If the

matter had stopped here, there would be no pretence for saying that the defendant was liable.

The next thing is the marriage-settlement. What is its separate operation? If of itself it makes the defendant liable to this action, so it does Donnison, and proves that *he* "subscribed the policy and became an insurer." Does it then make both of them so liable? Now, it seems to me to be an elaborate contrivance for insuring the son's life for the benefit of his intended wife and their children, and, if he lived, of raising a round sum of 10,000*l.*, *i.e.* shares worth 1500*l.* and money 8500*l.*, for the same purposes. The deed contains appropriate clauses for this purpose, the majority of which need not be noticed, except that they are such as might be expected in a bonâ fide instrument. But it contains an assignment to the defendant and Donnison of all the money, earnings, profits, and emoluments then in the hands of Fenn, and of such as should thereafter come to his hands as agent of Sharp the younger. To know the effect of this, it should be known what Fenn would have in his hands belonging to Sharp the younger,—a description of which will be found in the judgment of my Brother Blackburn in *Xenos* v. *Wickham.* (1) But, no doubt, it is an assignment of all the profits of the business; and, indeed, it might be an assignment of capital: thus, in one year there may be a balance of loss, which of course must come from capital; in the next year a balance of gain, which replaces capital. So, on one account there may be a loss, on another profit. Anyhow, everything is taken. But there is a trust, which I take to be obligatory, to return out of the assigned property, including the railway shares, any money from time to time required to meet exigencies in the business. The trustees, then, are to return what they received till the business can spare it. So far the deed seems very intelligible. It is as though the defendant and his son and Donnison had said, the son shall be *made* to save to the extent of 10,000*l.*, and for that purpose shall hand all he gets to the defendant and Donnison till they have got 10,000*l.*; but, as he may want it back for the business, all or part is to be returned to him when wanted for that purpose. But then, if everything is taken from him, he can neither maintain himself nor pay his

(1) 14 C. B. (N. S.) 435; 33 L. J. (C. P.) 13.

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debts. Accordingly, provision is made for paying the father his annuity, and for the son's maintenance, and for repayment of any part of the 5000*l.* the defendant may have to advance. What is the difference between this deed and a deed by which Sharp junior should have covenanted to pay to trustees of his marriage-settlement what he could spare after maintaining himself, paying his debts, and providing for the emergencies of his business? There is none, except that the trustees secure his doing so, by giving themselves, as far as they can, a right to take everything, handing back what he would otherwise have to deduct, and agreeing how much that shall be. Now, suppose the defendant had not been a trustee, would this deed have made Donnison a partner in or proprietor of the business? And, if so, why? If it would not, would it make the defendant so because there are trusts in it for his benefit? And, if so, why? And, if he (the defendant) is not liable in his character of trustee, nor in his character of cestui que trust separately, does it make any difference that he is both? And, if so, why? I cannot see. Suppose the covenants had been with the defendant and Donnison, to pay the moneys to other persons as trustees, A. and B., who would the partners or proprietors of the business be then? A. and B.? or the defendant and Donnison? or all four? Would they all have "subscribed the policy and become insurers?" It is to be observed that it does not appear that the defendant or Donnison ever received anything. It does appear that the defendant paid something under his guarantee. Reliance is placed on the statement that Sharp the younger kept no banking-account, and that Fenn received and paid; but that was to be expected. Reliance is also placed on this, that Sharp the younger paid what he drew out of the business into his father's account, and drew in his own name,—on the same bankers, of course,—to be paid out of his father's account. But I really see nothing in this. It is not suggested that he did not draw out as much as he paid in. Why, then, the deed being bonâ fide, is the defendant a partner or principal in the business? He can make no contract, nor order one, nor forbid one, nor enforce one, nor release one. If the profits were 10,000*l.* in the year, he would get nothing but his annuity; the residue would go to his son and the trust-fund. His annuity would be larger, indeed; but

that is unimportant. If there were no profits in any year, he would still be entitled to his 500*l.* annuity. How can this state of facts prove that the defendant "subscribed the said policy and became an insurer?" It seems to me, therefore, that, if the defendant is held to have "subscribed this policy and become an insurer," it will be so held, though, as I have said, he has not done so in form nor in substance; and that he has so done somehow, though there is no fraud, without his or anyone else concerned intending it. Surely, it seems enough to state this to shew that it cannot be true, and that therefore the defendant is not liable. The burthen of proof to the contrary is on the plaintiffs. Now, what reason do they give? They say that the defendant is a partner with his son; and that, if not partners inter se, they are so as regards third parties. A most remarkable expression! Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean inter se; for, partnership is a relation inter se, and the word cannot be used except to signify that relation. A. is not the agent of B.; B. has never held him out as such; yet C. is entitled, as between himself and B. to say that A. is the agent of B.! Why is he so entitled, if the fact is not so, and B. has not so represented? But "partnership," and a "right to call persons partners as regards third parties," are words, and the *thing* must be looked at, viz. the taking or sharing of profits, which it is said gives C. a right as against B. to say B. is a partner of A. Why should it? I trust, that, in the present state of authority, this question may be freely handled without presumption, and that the goodness of such a rule may be examined; because, though we are bound to administer the law as we find it, yet, when we are considering what *is* the law, we may not improperly inquire into the reasonableness of that suggested. Why, then, does a taking or sharing of A.'s profits by B. entitle C. to demand payment by B. of A.'s debts in the trade? How, if there is such taking or sharing in this case, does it prove that the defendant "subscribed the policy and became an insurer?" If A. agrees with B. to share profits and losses, but not to interfere with the business, and not to buy nor

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sell, and does not interfere, nor buy nor sell, and C., knowing this, deals with B., he would have no claim on A. Why should he, if he does not know of it? Why, upon finding out something between A. and B. which has in no way affected or influenced him, should he who has dealt with B. have a claim on A.? It is said, because profits are what the creditor trusts to, they are his fund for payment. This would be a bad reason, if true in fact. A man who trusts another *generally*, has a claim on his profits and capital too. How does a man who trusts the former only more affect the creditor's fund? But, further, it really is not true in substance, only in words. It is not a receipt of profits, in substance, that makes a man liable. If I agree to receive a sum in proportion to profits, as, for instance, a sum *equal to* a tenth, I am not liable. If I receive a tenth, I am. What is the difference, except in words, at least as far as creditors are concerned? How can one set of words between A. and B. give C. a right, and the same thing in other words not? How many men in a thousand, not lawyers, could be got to understand, that, of the two servants of a firm, the one who received a tenth of the profits was liable for its debts, and the other who received a sum equal to a tenth was not? This Mr. Justice Story, calls "satisfactory." (1) Satisfactory in what sense? In a practical business sense? No; but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercises, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life. Lord Eldon did not think it satisfactory. (2) Such a law is a law of surprise and injustice, and against good policy. It fixes a liability on a man contrary to his intent and expectation, and without reason, and gives a benefit to another which he did not bargain for and ought not to have, and prevents that free use of capital and enterprise which is so important. It is said that this is true of a dormant partner. It is not. His existence may be unknown to the creditor: but the dormant partner knows he is liable, and means to be; and the creditor trusts all such persons; he means to deal with all real persons. It may be said, that, if this reasoning is right, a man might bargain to receive all the profits of a business, and not be liable. The answer is, the thing is impossible. There

(1) Story on Partnership, § 32. (2) Ex parte Hamper, 17 Ves. 404.

never was, and never will be, a bonâ fide agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colourable. Where there is a chance of profit to the trader, there such an agreement may be honest; and, where honest, ought not to make him liable who is certainly to receive some of the profits, and perhaps all.

I have hitherto dealt with the case on principle. I proceed to examine the authorities. The labour formerly needful is now rendered unnecessary by *Cox* v. *Hickman*. (1) That case has settled the law, I may be permitted, I hope, to say, in a perfectly satisfactory manner. It is there laid down that the question in such cases as the present is one of authority, one of agency. Lord Campbell says (2): "The defendant can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose." Lord Wensleydale says (3): "And the simple question will be this, whether Haywood was authorized by either of the defendants as a partner in that company to bind him by those acceptances." His Lordship proceeds,—"Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants partners in it?" And, further (4): "The question then is, whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents to bind them by acceptances on account of the business." And, generally, I refer to his whole judgment, particularly to the passage at p. 313, beginning, "Hence it becomes a test of the liability," down to "liable as a partner." Lord Cranworth puts the same two arguments together at p. 306. I refer to the passage beginning "It was argued," and ending "to have been made." This, then, is our guide for the future.

The question here is, was the underwriter's business carried on by persons acting on the defendant's behalf? Now, it certainly was not. The clerk who signed the policy, Fenn, and the son, acted on the son's behalf. That is, unless the whole is a sham,—which, as I have before said, I think is not open to us to consider, nor true if

(1) 8 H. L. C. 268.
(2) Page 302.
(3) Page 311.
(4) Page 312.

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it were open to us. This ought to dispose of the case. But, even if we assume that the law supposed to exist before *Cox* v. *Hickman* (1) remains untouched, that is to say, the supposed law of *Waugh* v. *Carver* (2), I think the same conclusion ought to be come to. Lord Wensleydale does not notice that case. Lord Cranworth does, and, with submission, gives a better reason for the decision than is to be found in the case itself. The Chief Justice there says the question is whether they have not constituted themselves partners in respect to other persons, and puts his decision on the ground that "he who takes a moiety of all the profits indefinitely, shall by *operation of law* be liable to losses." Let us hope that this notion is overruled,—one which I believe has caused more injustice and mischief than any bad law in our books. But, even if not, how is this case within it? By the letter of the 1st of January, 1859, after the business had proved profitable, the son agreed to pay his father, for their joint lives, 500*l.* a year, *absolutely*, not out of profits, nor dependent on them; with a provision for an increase in proportion to profits if they reached beyond a certain amount. This would not make the defendant a receiver of profits, nor give him a right to an account, nor, in fact, bring him within any of the old fancied rules of liability. Then comes the settlement, in which the defendant is a trustee. As far as the settlement alone is concerned, the defendant is no more liable than the other trustee. And, why is *he* to be liable?

It remains to notice the judgment of the court below. With great respect, I think *Cox* v. *Hickman* (1) was not followed. The Chief Justice says the deed made the defendant a partner, by giving him an interest in the business; and he finishes by saying, the question is whether the creditors may come on the defendant in respect of the profits. But, according to the judgment in *Cox* v. *Hickman* (1), the question does not turn on that. Byles, J., seems to consider the deed as a contrivance for giving the defendant the profits,—that in reality it was his business. If so, of course he is liable. Montague Smith, J., says he thinks the deed an arrangement by which the defendant was to have the profits as profits eo nomine, and that he is liable as a partner. But, if Lords

(1) 8 H. L. C. 268. (2) 2 H. Bl. 235.

Cranworth and Wensleydale have laid down the true rule, it is not that indicated in the last expression.

It seems to me, then, there is here no partnership, no taking of profits, which could have brought the case within what was supposed to be law before *Cox* v. *Hickman* (1); that, on reason and principle, that supposed law was wrong; that it is now condemned by the authority of *Cox* v. *Hickman* (1); that anyhow, *Cox* v. *Hickman* (1) is the governing case; and that it lays down rules which decide this in favour of the defendant.

I hope I shall not be charged with arrogance for the way in which I have spoken of bygone opinions. The law had drifted into the condition from which it was rescued by *Cox* v. *Hickman*. (1) No one in particular was responsible for, and probably no one person could have put it at once in the position it was in. But the true line had been departed from, at first but a little, and for a good reason; and every subsequent move took it further away in a wrong direction, till it was happily brought back by *Cox* v. *Hickman*. (1)

The opinions of the majority of the Court being thus in favour of the defendant, the judgment of the court below was reversed.

Judgment reversed.

[APPEALS FROM REVISING-BARRISTERS' COURTS.]

GAINSFORD, APPELLANT; FREEMAN, RESPONDENT. *Nov.* 21.

Parliament—County Vote—Assignee of lease—2 *Wm.* 4, *c.* 45, *s.* 20—6 *Vict. c.* 18, *s.* 74.

A being possessed of the residue of a lease for 999 years bequeathed it to trustees in trust, as to one-sixth of the rents, to pay them to B for life, and after his death to his children:—

Held, that B was not the assignee of the residue of the term, within the meaning of section 20 of 2 Wm. 4, c. 45, (amended by 6 Vict. c. 18, s. 74) (2), and was not entitled to a county vote.

APPEAL from the decision of the revising-barrister for the southern division of the West Riding of Yorkshire.

(1) 8 H. L. C. 268.

(2) 2 Wm. 4, c. 45, s. 20, provides that the assignee for the unexpired residue, whatever it may be, of any

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John Chadwick Jackson, on the list of claimants, was objected to. The nature of the qualification, stated in the third column, was "one sixth share of fourteen leasehold cottages, held for a term of 999 years."

John Jackson, the father of the claimant, by his will gave to trustees all his real and personal estate upon trust, to pay the rents and annual produce thereof to his wife (who, as well as the testator, died previous to July 31, 1864) for her life, and from and after her decease, then as to one undivided sixth share of his said estate upon trust, to pay the rents and annual produce thereof to the claimant during his life, and after his death, upon * trust for the children of the claimant, to be divided amongst them, if more than one, in equal shares, as tenants in common.

The testator was possessed for a term of 999 years of the leasehold cottages, and it was in respect of one sixth share of the same, bequeathed as aforesaid, that the claimant claimed to vote. The annual income of one sixth share amounted to more than 10*l.* a year.

The points taken on the part of the claimant were, that the gift of the rents and produce of the one-sixth share of the leasehold cottages for the life of the claimant was equivalent to a gift of the whole term to him, if he should so long live; and as, in contemplation of law, the life might last longer than the term, that the claimant was a cestui que trust for the term of 999 years, and an equitable leaseholder, or an equitable assignee of a lease within the meaning of the Reform Act [2 Wm. 4, c. 45,] s. 20; and that, being in receipt of the clear yearly sum of 10*l.*, over and above all rents and charges payable out of or in respect of the same, he was entitled to a vote.

The objector contended that the testator being only possessed of a term of years, could not give a greater estate in the premises

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term originally created for a period of not less than 60 years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, shall in any case have a right to vote in any such election, for or by reason of any trust estate therein, but that the cestui que trust in actual possession or in receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust.

shall be entitled to vote for the county, &c. by 6 Geo. 4 c. 18. s. 74. It is provided that no trustee of any lands or tenements

than that which he possessed, and that the claimant was not, in the language of section 20 of the Reform Act, entitled, either as lessee or as assignee, to the one sixth for the unexpired residue of a term originally created for a period of not less than sixty years, but only for such a portion of the term as his own life might endure.

The revising-barrister allowed the vote.

Bowen, for the appellant. The question is, whether the claimant was the assignee of the residue of the term within the meaning of the Reform Act, s. 20. One test is to inquire whether all the rights in the testator had passed to the claimant; and they had not, for he had the term subject to the condition that he should so long live. Another test is to inquire what would be the result if the claimant assigned again. He could not assign the same thing that the testator had assigned, but only an interest in it during his life. Again, he had not an equitable right to all to which the trustee had a legal right, for he had only one of the parts into which the trustees' interest in the land was divided. He could not be said to have the whole equitable interest, because there were others who had a right to interfere if the trustees acted so as to endanger their interests.

Manisty, Q.C., for the respondent. If the claimant's interest had been a legal one, he would have had in law the whole of the term vested in him which had belonged to the testator, and his children would have taken only by way of executory devise. *Matthew Manning's Case* (1) and *Lampet's Case* (2), and the effect of 6 Vict. c. 18, s. 74, is to enable a person who would be entitled to vote, if he had the legal interest, to do so if he has the like equitable interest. Again, the trustees would clearly be entitled to vote if they had a beneficial interest in the property, and the 6 Vict. c. 18, s. 74, may mean that, if the trustee would be entitled to vote, the cestui que trust for the time being shall be so entitled, the legislature looking rather at the property to be represented than at the nature of the owner's title.

ERLE, C.J. I am of opinion that the decision of the revising-

(1) 8 Rep. 94 b. (2) 10 Rep. 46 b.

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barrister should be reversed. The qualification is created by the 20th section of the Reform Act. The testator was entitled to the unexpired residue of a term which was originally created for more than sixty years. He vested the term in trustees in trust for the claimant for life; and it is said that a chattel interest, being less than an estate for life, the whole residue of the term vested in the claimant. I think he cannot resort to that legal fiction; he is obliged to claim as cestui que trust under 6 Vict. c. 18, s. 74, and then he must take subject to the equitable rights and liabilities, and it is clear that in equity he has not got the residue of the term.

WILLES, J. I am of the same opinion. Unless you read the 74th section, "That *that* cestui que trust who is in actual possession shall be entitled to vote," I do not see how it can be said that a cestui que trust is entitled to vote who is not possessed of an estate which, if legal instead of equitable, would entitle him to vote under section 20 of the Reform Act. It is clearly requisite, therefore, that the claimant should have a beneficial interest in the entirety of the term, and this he has not, because his interest is subject to be defeated by his death.

BYLES, J. The two statutes, 2 Wm. 4, c. 45, s. 20, and 6 Vict. c. 18, s. 74, taken together, seem to mean that a person beneficially entitled to property which would entitle him to vote under the first statute, shall not be deprived of his vote by reason of his not having the legal estate in it. It is not necessary to decide what would have been the case if the claimant had had a legal instead of an equitable interest, though even then I should have found great difficulty in saying that he had the property for the unexpired residue of the term. But here we are dealing with an equitable interest, and that equitable interest must be one which will endure to the end of the term, which that of the claimant clearly will not.

KEATING, J. I am of the same opinion. The claimant grounds his claim on his beneficial interest in the term, and he is certainly not beneficially entitled to the residue of the term.

Decision reversed.

DODDS, APPELLANT; THOMPSON, RESPONDENT.

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Nov. 20.

Parliament—County Vote—Qualification—"Tenement" within 8 *H.* 6, *c.* 7—*Rent seck—Distress under* 4 *Geo.* 2, *c.* 28, *s.* 5.

A rent-charge granted by a deed containing no power of distress, is within the statute 4 Geo. 2, c. 28, s. 5, and therefore a "tenement" within the 8 Hen. 6, c. 7.

6 C.B. 285.
2 C.B.N.S. 39
40.

AT a court held for the revision of the list of voters for the parish of Alnwick, in and for the northern division of the county of Northumberland, William Thompson, on the register of voters for the township of Morpeth, in the said division, duly objected to the names of Robert Dodds and nine other persons being retained on the said Alnwick list of voters.

The names, descriptions, and qualifications of the persons so objected to, stood on the register as follows. [Here followed a schedule in which the qualifications of the parties were described as "Freehold rent issuing out of freehold dwelling-houses," or "Freehold rent-charge issuing out of freehold house," describing the situation of the qualifying property.]

These several persons claimed to be entitled to vote under or by virtue of certain deeds which were produced and proved before the revising-barrister. A copy of one of the deeds was as follows:—

"This indenture, made the 22nd of January, 1851, between Robert Dodds, the elder, of Alnwick, &c., of the one part, and Robert Dodds, the younger, of Alnwick aforesaid, and Adam Dodds, of the same place, sons of the said Robert Dodds, the elder, of the other part, Witnesseth, that, in consideration of the natural love and affection which the said Robert Dodds, the elder, bears towards the said Robert Dodds, the younger, and Adam Dodds, he, the said Robert Dodds, the elder, doth hereby give and grant unto the said Robert Dodds, the younger, and Adam Dodds, their heirs and assigns, one annual sum or yearly rent-charge of 4*l.* 4*s.* of sterling money, to be charged and chargeable upon, and yearly issuing and payable out of all those messuages, burgages, or tenements, situate, standing, and being in Clayport Street, in Alnwick aforesaid (describing the occupation and boundaries), to have, receive, take, and enjoy the said annual sum or yearly rent-charge of 4*l.* 4*s.* unto and by them the said Robert

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Dodds, the younger, and Adam Dodds, their heirs and assigns for ever, in equal shares, as tenants in common, and to be paid on the 25th of January in every year, free and clear from all deductions whatsoever, the first payment thereof to begin and be made on the 25th of January now instant. In witness," &c.

This deed was duly signed, sealed, and delivered, and all the other deeds were to the same effect, and were to be taken, mutatis mutandis, as if stated as part of the case.

It was proved that each of the grantors named in the several deeds was seised in his demesne as of fee of and in the lands and tenements in those deeds respectively described, and out of which respectively the annual sums or rent-charges therein respectively mentioned, and therein expressed to be issuing; that the same annual sums or rent-charges had been received by the several grantees; and that the annual value of the lands and tenements out of which the same annual sums or rent-charges respectively were to issue was sufficient to answer and to pay the same annual sums or rent-charges respectively.

It was contended on the part of the objector that there was no power of distress, and that, therefore, there was no sufficient qualification.

On the other hand, the claimants contended that these deeds were quite sufficient, without any power of distress being contained in them, to confer a qualification to vote for a county, and that the statute 4 Geo. 2, c. 28, s. 5, gave the grantees a power of distress.

The revising-barrister decided, that, without a power of distress, the grants were respectively insufficient to confer a qualification to vote, and that there was no power of distress. He, therefore, disallowed the claims of Robert Dodds, the younger, and of the nine other persons, and erased their names from the list. The cases were consolidated.

If the Court should be of opinion that the deeds, notwithstanding the absence of an express power of distress, were respectively sufficient to confer a qualification to vote, the names of the several parties were to be restored, and the register altered accordingly.

Joshua Williams, Q.C., for the appellant. It is difficult to conceive how any doubt could have been entertained in this case,

the words of the statute 4 Geo. 2, c. 28, s. 5, are so clear. It recites that "the remedy for recovering rents seck, rents of assize, and chief rents, are tedious and difficult," and it enacts that, from a day named, "all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same, in case of rent seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years before the first day of this present session of parliament, or shall be hereafter created, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding." The point was incidentally decided in *Bradbury* v. *Wright* (1), where the question was whether, on a grant of a fee-farm rent of ancient date, "without any deduction, defalcation, or abatement for or in any respect whatsoever," the grantee was entitled to receive the full rent, without deducting the land-tax: and Buller, J., said, "If this rent was a rent seck, the distress could not be supported but on the authority of 4 Geo. 2, c. 28, s. 5." In *Saward* v. *Anstey* (2), speaking of annuities charged by a will on certain lands, Best, C.J., says: "These annuities were only charges on the estate, and not personal charges on the owner; until the statute of 4 Geo. 2, c. 28, therefore, they could not have been distrained for: that statute has now given a distress to the owners of rents seck." In *Buttery* v. *Robinson* (3) also, it was assumed that such a rent might be distrained for under the 4 Geo. 2, c. 28, s. 5. Blackstone, after describing the several species of rents, referring to the statute, says, (2 Bl. Com. 43): "These are the general divisions of rent: but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents seck, rents of assize, and chief rents, as in case of rents reserved upon lease," Again, in Vol. 3, p. 6, Blackstone says: "Distresses were incident by the common law, to every rent-service, and by particular reservation to rent-charges also; but not to rent seck, till the statute 4 Geo. 2, c. 28, extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we

(1) Doug. 624. (2) 2 Bing. 519; 10 B. Moore, 55.
(3) 3 Bing. 392; 11 B. Moore, 262.

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may lay it down as an universal principle, that a distress may be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it." In *West* v. *Robson* (1), where the court had to deal with certain yearly payments to the fellows of a college, it is said in the judgment, "It is clearly not a rent-charge, *there being no power of distress*;" but that was a totally different case from this; the land there was vested in trustees for certain special purposes, and the decision turned upon a totally different point. (2)

Manisty, Q.C., for the respondent. The only question is, whether, looking at the terms of the deed set out in the case, the claimants are possessed of "free land or tenement to the value of 40*s.* by the year at the least above all charges," within the 8 Hen. 6, c. 7. The rent in question is a rent seck; and the parties have not thought fit to say that it shall be subject to the right of distress. For such a rent there could be no remedy either by writ of annuity or by distress upon the land. It has never been contended that a rent seek is a freehold tenement within the statute.

[BYLES, J. I never knew it doubted. It would not be the less a freehold tenement because there was no power of distress.

WILLES, J., referred to *Webb* v. *Jiggs* (3), where it was held that debt does not lie at the common law, nor by the statute 8 Anne, c. 14, for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout so long as the estate of freehold continues.

[BYLES, J. Assize being gone, and debt being gone, what becomes of the rent seck?]

The remedy would probably be upon the implied covenant to pay the rent. But that would not give the right the statute 8 Hen. 6, c. 7, contemplated. Before the 4 Geo. 2, c. 28, this deed would clearly have created only a dry rent, which would not have been enforceable by entry on the land, no power of distress being reserved in it. But it is said that the 5th section of that statute converts it into a rent-charge. No doubt, the words of that section are very large. The question is, whether the Court will hold that

(1) 3 C. B. (N.S.) 422, 438; 27 L. J. (C.P.) 262.

(2) See Williams on Real Property, 7th ed. 303.

(3) 4 M. & S. 113.

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the effect is to make this a freehold tenement within the spirit of the statute creating the qualification, which it clearly was not before.

J. Williams, Q.C., was not called on to reply.

ERLE, C. J. I am of opinion that the decision of the revising-barrister should be reversed. The claim of qualification on the part of the persons objected to was in respect of a freehold tenement, viz., a rent of more than 40*s.* a year charged upon freehold land. In the grant of this rent-charge no mention is made of the remedy for enforcing payment of it; therefore, before the statute 4 Geo. 2, c. 28, I take it for granted it would have been a mere rent seck: and, assuming that to be so, I am by no means convinced by the argument of Mr. Manisty that the grantee of a rent seck issuing out of freehold land was not the owner of a freehold tenement within the 8 Hen. 6, c. 7. It would seem rather to be clear from Coke's Commentary on section 219 of Littleton, that there was a remedy for it by real action. Real actions being now abolished by the statute 3 & 4 Wm. 4, c. 27, if need was, it would be the duty of those having the administration of the law to find some other appropriate remedy. But we need not have recourse to that here, because the statute 4 Geo. 2, c. 28, s. 5, has given a remedy by distress. This, then, being a rent-charge on freehold land, the payment of which may be enforced by distress under the statute, fulfils every requisite for the acquisition of a qualification to vote. The decision of the revising-barrister must be reversed.

WILLES, J. I am of the same opinion. This certainly is not a sort of question on which one ought to pronounce a judgment without great consideration. Personal actions were not maintainable against a terretenant, because there was a higher remedy; and real actions were abolished by the 3 & 4 Wm. 4, c. 27. This, no doubt, was the difficulty which presented itself to the mind of the revising-barrister. The knot, however, was cut, so far as regarded the remedy for rents issuing out of or charged on land, by the 4 Geo. 2, c. 28, s. 5, which gave the remedy by distress upon the land. It cannot be said that a rent service or a rent seck did not fall within the description of a "tenement" in Co. Litt. 6. a. "Tenementum, tenement," says Coke, "is a large word to passe not only lands and other inheritances which are holden, but also

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offices, *rents*, commons, profits a prendre out of lands, and the like wherein a man hath any franktenement, and whereof he is seised ut de libero tenemento." On consideration, I think the decision of the revising-barrister was wrong, and that the claimants were entitled to be on the register.

BYLES, J. I am of the same opinion. It seems to me to be clear, that, before the abolition of real actions, a rent issuing out of land was a "tenement" within the 8 Hen. 6, c. 7. The only difficulty here is, that the deed which creates the rent contains no power of distress. Since the 3 & 4 Wm. 4, c. 27, no real action would lie for it: nor, it seems, would a personal action. No remedy for enforcing the rent being pointed out at law, and it being doubtful whether there be any in equity, this is an à fortiori case for the application of the statute 4 Geo. 2, c. 28, s. 5.

KEATING, J. I am of the same opinion. I think this rent-charge is a "freehold tenement" within the contemplation of the 8 Hen. 6, c. 7. And though real actions are now abolished, and consequently the remedies then existing for the recovery of such a rent gone, I think the want is supplied by the 4 Geo. 2, c. 28, s. 5, which gives a remedy by distress for all rents charged upon land. The decision of the revising-barrister, therefore, must be reversed.

Decision reversed.

Nov. 21.

SMITH, APPELLANT; JAMES, RESPONDENT.

*Parliament—County Vote—Expunging name of Voter—Qualification—*6 *Vict.* c. 18, s. 40.

The qualification of a county voter was stated in the list to be "freehold share in Fulham Bridge." His vote was not objected to, but the revising-barrister expunged his name, on the ground that this Court, in *Tepper* v. *Nichols* (1), had decided that the shareholders in Fulham Bridge had no qualification:—

Held, that, the qualification being good on the face of it, the revising-barrister had no power to expunge the name, unless it was properly objected to.

APPEAL from the decision of the revising-barrister for the county of Middlesex.

(1) 18 C. B. (N. S.) 121; 34 L. J. (C. P.) 61.

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The revising-barrister expunged the name of James Buckingham Bevington from the list of voters. The qualification stated in the third column was "Freehold share in Fulham Bridge."

The voter was not objected to, but the revising-barrister expunged his name from the list of voters on the ground that his qualification, as stated in the list, was insufficient in law to entitle him to vote, according to the decision of the Court of Common Pleas on the 24th of November, 1864, in the case of *Tepper* v. *Nichols* (1), the Court having in that case decided that the shareholders in the Fulham and Putney Bridge have no qualification, and are not entitled to vote in respect of their shares therein. It was admitted that there was no distinction between the qualification in that case and the present one, but it was contended on the part of the voter that as no objection had been made by any party to his name being retained on the register, either on the ground of the decision in *Tepper* v. *Nichols* (1), or on any other ground, and as his qualification, as stated in the list of voters, was in form and substance, independently of that decision, sufficient in law to entitle him to vote, the revising-barrister had no power to expunge his name, but must treat his qualification as good on the face of the register, until proved or shewn to be insufficient by the decision in *Tepper* v. *Nichols* (1) being formally brought before him by means of an objection to the vote, without which he could take no judicial notice of such decision. The revising-barrister held that the qualification of the voter, as stated in the list revised by him, was in form and in substance the same as that which, in the case of *Tepper* v. *Nichols* (1), had been decided to be insufficient in law to entitle the claimants therein mentioned to vote in respect of such qualification, and that he was bound in accordance with that decision, whether it was or was not made the ground of a formal objection to the name of the voter being retained on the register, to expunge his name. The revising-barrister on the same ground expunged from the list the names of twenty-eight other voters.

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Hayes, Serj., for the appellant. The qualification as stated in the list was sufficient. The effect of the decision in *Tepper* v *Nichols* (1) is only to shew that the statement of the qualification

(1) 18 C. B. (N. S.) 121; 34 L. J. (C. P.) 61.

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is not true, the share not being freehold; but into that the revising-barrister had no right to inquire, no objection having been taken.

He was stopped by the Court.

Bourke for the respondent. The revising-barrister proceeded entirely under the 40th section of the 6 Vict. c. 18, which enacts that the revising-barrister "shall expunge the name of every person whose qualification as stated in any list shall be insufficent in law to entitle such person to vote." It was admitted that the qualification was the same as that which was held insufficient by this Court in *Tepper* v. *Nichols* (1), and he was therefore bound to expunge the name.

ERLE, C.J.—The case is too clear for argument. The qualification was good on the face of it; and, though in fact the voter cannot have possessed such a qualification, the revising-barrister could not take notice of that, unless the vote was duly objected to by a properly qualified person.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision reversed.

Nov. 21.

JONES, APPELLANT; JONES, RESPONDENT.

*Parliament—County vote—Notice of objection—Date—*6 *Vict. c.* 18, *ss.* 7 *&* 101.

Notice of objection to a county vote under 6 Vict. c. 18, s. 7, need not be dated the same day as that on which it is signed: it is sufficient if it is dated some day within the limits allowed for giving notice, and while the objector is duly qualified to give it.

Parkinson v. *Brophy* (2) dissented from.

APPEAL from the decision of the revising-barrister for the county of Merioneth.

John Jones objected to the name of Richard Jones being retained in the list of voters for the county of Merioneth.

The notice of objection to the voter was dated the 18th of August, 1865, but the notice to the overseers was dated the 12th of August, 1865. It was proved that both notices were signed by the

(1) 18 C. B. (N. S.) 121; 34 L. J. (C. P.) 61. (2) 15 Ir. C. L. Rep. 346.

objector on the 18th of August, 1865, and that they were both duly served.

It was contended, on the part of the voter, that the notice to the overseers was invalid, because it contained a date different to that on which it was signed; and that the notice ought to have been dated the day on which it was signed. It was contended on the part of the objector that the notice was sufficient.

This was the only question raised, and the revising-barrister held that the notice of objection was bad, and retained the vote for that reason.

Granville Somerset for the appellant. The 6th Vict. c. 18, s. 7, requires that a notice of objection shall be given to the overseer, according to the form numbered (4) in schedule (A), or, "to the like effect." It is not, therefore, necessary that the precise form should be followed. In *Beenlen* v. *Hockin* (1) it was held that the year must be inserted, but Maule, J., there remarked that a voter who was objected to in successive years might otherwise mistake a fresh notice for the old one, and pay no attention to it. In *Knowles* v. *Brooking* (2), and again in *Melbourne* v. *Greenfield* (3), it was held that the place of abode of the objector must be stated.

[ERLE, C. J. That was to enable the person objected to to enforce the payment of costs against the objector if necessary.]

In the present case it is clear, from the finding of the revising-barrister, that no inconvenience could result from the inaccuracy in the date. It is true that in the case of *Parkinson* v. *Brophy* (4), which was decided on the Irish Reform Act, the words of which are identical with those of the English act, it was decided that it was necessary that the day on which the notice was signed should be inserted in the date; but that decision was founded on the authority of the cases in the English courts; and Hayes, J., who dissented from the majority of the court, pointed out the true distinction, that no inconvenience would follow from a mistake in the day, such as might arise from the omission of the year or place of abode.

(1) 1 Lutw. 526; 4 C. B. 19; 16 L. J. (C. P.) 49.

(2) 1 Lutw. 461; 2 C. B. 226; 15 L. J. (C. P.) 197.

(3) K. & G. 261; 7 C. B. (N. S.) 1; 29 L. J. (C. P.) 81.

(4) 15 Ir. C. L. Rep. 346.

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Morgan Lloyd for the respondent. The form given in the act includes a date, and it has been decided that the date is a necessary part of the form. The date can mean nothing unless it means the time of signing the notice; and in *Beenlen* v. *Hockin* (1), Wilde, C. J., says: "What is meant by dated? It means that the time should be fixed at which a particular act is done." In this case the act done is signing, for that is the only act which must be done by the objector himself.

[WILLES, J. In the case of a fiat in bankruptcy, or an escrow, the true date of the instrument is the time at which it is issued, and not the date that appears on it.]

In those cases the date is not an essential part of the instrument. All the English decisions were reviewed, and the present question decided, in the case of *Parkinson* v. *Brophy* (2), in which it was held that, in both the forms (4) and (5) in schedule (A), it is essential that the date should contain the very day on which the notice is signed. The interpretation clause, section 101, will not affect the present case, because the person who dated the notice wrote what he intended to write, *Melbourne* v. *Greenfield*. (3) If he had written the date on the day on which he signed the notice, but mistaken what day of the month it was, the case might have been different.

Granville Somerset in reply.

ERLE, C. J. I am of opinion that the decision of the revising-barrister should be reversed. The notices of objection given in forms (4) and (5) in schedule (A) of the 6 Vict. c. 18, s. 7, are notices of objection to be delivered to the overseers and to the person objected to respectively. In the present case both were actually signed on August 18, but the notice to the overseers was dated August 12, and that to the person objected to August 18. An objection was raised that the former notice, dated August 12, was void because it was signed, and so became a complete instrument on the 18th, while the act requires that it should bear on the face of it the exact date of the signature. I do not see that the act does clearly require that. It requires that the notice should be given, and that it should have a date, and that the date should contain

(1) 1 Lutw. 526; 4 C. B. 19; 16 L. J. (C. P.) 49.
(2) 15 Ir. C. L. Rep. 346.
(3) K. & G. 261; 7 C. B. (N. S.) 1; 29 L. J. (C. P.) 81.

the day, month, and year, and also that it should be signed; but I think if it is dated on any day on which the objector is qualified to object, and within the period allowed for the making of objections, it is valid as far as the date is concerned, although the signature may not have been actually written on that day. We are to assume that the legislature has a reasonable intention, and when the words of the act are not express, we are so to interpret them as to give effect to those intentions. It was on this ground that the Court held that the place of abode of the objector was essential, and that the year should be given in the date, as inconvenience might arise to the person objected to by their omission. I cannot see that it can make the smallest difference to any one whether the day of the date coincides with the day on which the signature is actually written or not. Such being the ground of the English decisions, the question came before the Irish court in the case of *Parkinson* v. *Brophy* (1). There is no body of judicial men for whom I have a higher respect than the Irish judges, but I do not think that the act so clearly requires the exact day of the signature to be inserted as the majority of the judges in that case thought it did, and we must therefore look to the purpose of the act; and I agree with Hayes, J., and think that the present case is distinguished from those previously decided by the fact that it can be of no importance to any one whether the date contains the exact day of the signature of the notice or not, and I am of opinion, therefore, that it is not necessary that it should do so.

WILLES, J. I am of the same opinion. The use of the words "to the like effect," in section 7 of 6 Vict. c. 18, and the means given by the act for correcting errors of various kinds, shew that the notice need only agree with the form given by the act in substance, and need not be identical with it. The fact that in form (4) the act uses the words "dated *the* day," and in form (5) the words "dated *this* day," leads to the same conclusion. The notice, however, must not differ from the form given in the act in any particular which would deprive it of any of its effect.

The date of a document may mean the time at which it is completed, or it may mean the time at which it was issued so as to become operative. In the case of a fiat in bankruptcy, the latter was

(1) 15 Ir. C. L. Rep. 346.

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held to be its meaning, *Pewtress* v. *Annan* (1). It can hardly mean that here, however, because the means of filling-in the date would not usually be at hand at the time when the notice is delivered. Does the date then mean here the time at which the signature is affixed to the notice? If so, it follows that if the objector dated and signed the notice of objection on the 12th, and kept it in his pocket till the 18th, and then delivered it, it would be good, but if he put it into his pocket unsigned, and signed it at any other time before he delivered it, it would be invalid, although it would be exactly the same in appearance and effect. I see nothing in the word "dated," or in the form given in the schedule, which shews that the legislature intended such a strange conclusion.

I must therefore try and find some other meaning for the word date: and I think it is found in the construction that has been put on it by the Lord Chief Justice, viz., that the notice must bear the date of a day within the limits within which a notice of objection can lawfully be given, and must also be dated and signed by a person having a right to object, at a time when he has such a right. I think this construction does no violence to the words of the act, and is consistent with its purpose.

BYLES, J. I am of the same opinion. The question is one of great importance, because it arises also in the case of claims to vote, the form of claim given by the act being similar, in this respect, to the form for the notice of objection. I think the difficulty arises from not noticing what the act does, and what it does not require. The act requires that the notice should be dated, but I agree with my brother Willes that the date does not necessarily, nor indeed usually, mean the time at which a document is signed; it usually means the time at which the instrument is delivered, so as to become effectual; this is so in the case of the most formal instrument, a deed; and I should think it is primâ facie the case with other documents. Applying this, the true date of the notice was the time at which it was delivered, and the 12th day ought to have been altered to that date; this was not done, and I think it clearly falls within the 101st section, which says that "no misnomer or inaccurate description of any person, place, or thing named or described in any .... notice required by

(1) 9 Dowl. 828.

this act, shall in anywise prevent, or abridge, the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in .... such notice as to be commonly understood." This section applies where a person means to do one thing and does another, the case here, for the objector meant to insert the true date of the instrument, but has inserted an incorrect date. I think, therefore, that this does not invalidate the notice.

KEATING, J., concurred.

Decision reversed.

GEORGE MOORE SMITH, APPELLANT; JOHN HOLLOWAY AND OTHERS, OVERSEERS OF WHITTLESEY, RESPONDENTS.

Nov. 20.

Parliament—County vote—Registration Act, 6 Vict. c. 18, s. 7—Notice of Objection to Overseers, Form of.

A notice of objection to a county voter, served upon overseers, under the 6 Vict. c. 18, s. 7, was in the following form:—"I hereby give you notice that I object to the *names* of the *persons* mentioned and described below being retained in the list of voters," &c.—the several names and descriptions of the parties objected to being contained in a schedule at the foot of the notice:—

Held, a sufficient compliance with the statute and schedule A, No. 4.

AT a court held for the revision of the list of voters for the parish of Whittlesey, in the Isle of Ely and county of Cambridge, it was proved that notice of objection had been duly served upon Jonathan Smith and twenty-eight other persons whose names appeared in the list of voters for that parish: but the only notice of objection which was served upon the overseers was the schedule a copy of which was annexed to the case, and which was as follows:—

"To the overseers of the parish of Whittlesey, in the county of Cambridge.

"I hereby give you notice that I object to the names of the persons mentioned and described below being retained in the list of voters for the county of Cambridge." [Here followed a schedule, with four columns respectively headed, "Christian and surname of the voter objected to, as described in the list or register," "Place of abode, as described," "Nature of qualification, as de-

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scribed," "Street, &c., where the qualifying property is situate, &c., as described in the list or register," in which were inserted the names, places of abode, and alleged qualifications of the several persons objected to.] "Dated the 11th day of August, 1865.

"George Moore Smith, of Whittlesey."

This schedule was served upon the overseers in due time: and G. M. Smith, by whom it was signed, was upon the list of voters for the Isle of Ely and county of Cambridge.

The revising-barrister held that this schedule was not such a notice of objection to the overseers as is required by the 7th section of the 6 Vict. c. 18, but that a separate notice should have been given to the overseers in respect of each person objected to, and that he had therefore no jurisdiction to hear the several objections.

The question for the opinion of the Court was, whether the schedule above mentioned was a sufficient notice of objection to the overseers according to the form numbered 4 in schedule A to the 6 Vict. c. 18, or to the like effect.

If the Court should be of opinion that the notice was sufficient, the names of all the persons contained in the schedule were to be struck out of the list of voters for the parish of Whittlesey. If the Court should be of a contrary opinion, the names were to remain in the list.

Markby, for the appellant. The revising-barrister was clearly wrong in holding this notice insufficient. The question is, whether the comprehensive notice served upon the overseers is "a notice according to the form numbered 4 in schedule A to the 6 Vict. c. 18, or to the like effect," or whether the 7th section requires that there shall be a separate notice of objection for each individual case. The form has been literally followed, using the plural instead of the singular number.

[KEATING, J. This form tends to facilitate the performance of the overseers' duty.

BYLES, J. But it increases the peril. The notice may be sent by post; and, if it miscarried, all the objections would fail.]

There is nothing that can affect the rights of these parties in the course adopted here. These notices are never made public, but

a list of the persons objected to is to be published by the overseers and delivered by them to the clerk of the peace: ss. 8, 9.

The respondent did not appear.

ERLE, C.J. The 7th section of the act requires a notice of objection to be given to the overseers according to the form numbered 4 in the schedule A, "or to the like effect," and also a notice to the party objected to according to the form numbered 5, or to the like effect. In the present case, the objector, having objections to make to twenty-nine voters in the parish, gave a notice to the overseers that he objected to "the names of the persons mentioned and described below being retained in the list of voters," &c.; and then followed a schedule containing the names, descriptions, and qualifications of the twenty-nine persons pointed at. Although a novelty, I think the notice sufficient. The statute says that the notice shall be in the form in the schedule, or to the like effect. I think this is to the like effect. The strict compliance with the statute undoubtedly would have been to have sent the notices to the overseers upon twenty-nine separate sheets of paper. I cannot help thinking that this is aided by the interpretation clause, s. 101, which provides that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." The obvious meaning of this notice is, "I object to the name of each of the persons mentioned and described below being retained in the list of voters," &c.; and every person reading the notice would have so understood it. I think the decision of the revising-barrister must be reversed, and that the names of all the persons contained in the schedule must be struck out.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision reversed.

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ROBERT HARRIS, APPELLANT; PETER FABYAN SPARKE AMERY, RESPONDENT. (1)

Parliament—Borough Vote—Companies Act, 1862 (25 & 26 *Vict. c.* 89)—*Illegal Association—Reform Act* (2 *Wm.* 4, *c.* 45); *Qualification of Voter—Occupation as Tenant under s.* 2—"*Building.*"

A and forty-five other persons hired land, upon which there was a stone building, the lower part of which (open in front) was used for feeding bullocks, and the upper story (inclosed on all sides) for storing the produce of the land. The rent of the land was 473*l.* 10*s.* per annum, and the tenants paid tithes (to the amount of 28*l.* per annum) and other taxes. The value of the building was 6*l.* per annum. The business of the farm was conducted by a manager on behalf of himself and all the other partners. The partnership was not registered under the Companies Act, 1862, 25 & 26 Vict. c. 89 :—

Held, that this was an illegal association under s. 4 of the Companies Act, and consequently that the several members did not acquire the franchise as occupying tenants within the 27th section of the Reform Act, 2 Wm. 4, c. 45.

Whether the "building," regard being had to its character and relative value, was such as would have conferred a qualification under section 27,—*quære*. (2)

AT a court held for the revision of the list of voters for the borough of Totnes, Robert Harris objected to the names of Peter Fabyan Sparke Amery and forty-two other persons being retained thereon.

The facts were as follows:—In pursuance of an agreement entered into between Amery and forty-five others (one of whom is since dead, and two failed to appear to answer the objection) and Elias Ford, previously to the 31st of July, 1864, a copy of which agreement was annexed to the case (3), the voter and his partners

(1) The person named originally as respondent had died before the appeal came on to be heard, and Mr. Amery's name was substituted in the case by consent, he being a party to one of the appeals consolidated herewith.

(2) See *Morish* v. *Harris*, post, p. 155.

(3) The agreement was as follows:—"Memorandum of an agreement entered into this 27th of July, 1864, between Elias Ford, of &c., and Messrs. John Endle (and forty-five other persons) of the other part, witnesseth that the said Elias Ford, by way of agreement and not of lease, agrees to let, and the said parties of the other part agree to take, *as tenants at will*, all those lands, *with the buildings and premises thereunto belonging*, situate in the parish of Totnes, and containing 142 acres, 3 roods, and 19 perches, or thereabouts, as set forth in the schedule annexed, on and from the 31st of July, 1864, subject to the following conditions:—The said parties of the other part to pay a clear yearly rental of 473*l.* 10*s.*, which rent shall be

did on that day enter into possession of 142 acres, 3 roods, 19

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payable quarterly if demanded; to pay all rates and taxes and amount of tithe-commutation up to the 1st of April after the expiration of the holding except property-tax; to keep and leave the gates, gate-pillars, bars, posts, railings, and fences generally in good tenant-able repair, having rough timber allowed them for so doing, and to deliver up the same at the expiration of their holding; not to underlet or assign any portion of the said lands without written permission from the landlord or his agent; to keep and leave such drains which may be made, with all others now laid on the lands open and in good repair, and to cleanse and scour all lakes and water-courses, and in every year to carry and fetch all materials for repairs; to break down and level away any old hedges or wastes required, and to keep in repair all new hedges or fences to be erected on the lands; to cut all weeds on the lands before the 1st of June, and twice during the year if required; not to stock the orchards with any cattle that will injure the trees, and keep them well manured and free from weeds and fully planted with such good young trees as shall be approved of by the agent of the landlord; that the said lands shall be laboured and manured in all respects agreeable to the rules of good husbandry, and particularly without prejudice to the generality of this clause; to manure the pasture-ground one round in the first four years, if not mown, with 120 seams of good dung, or composte, or chemical manures, to the value of not less than 40*s.* an acre original cost, but, if mown, then at the rate of 80 seams of dung or chemical manures, to the value of not less than 30*s.* per acre, as often as mown; to keep the meadows properly floated at the proper seasons, and not to mow them more than once for hay in each year; not to break up any of the meadows or pasture land, nor any of the orchards, except by written permission from the agent of the landlord with a view to manure and improve the same, when no corn crop shall be taken, under a penalty of 20*l.* per acre additional rent; not to pare or prune any timber-trees or saplings of any kind whatsoever; not to cut any wood in the last year of their holding, nor the wood from any hedge, except when such hedge is properly made, unless it be annually cut off square on the top; and to cut and make all hedges when of seven years' growth, if required, those against the road to be cut off every year. On the due performance of these conditions, the landlord agrees, for himself, his heirs and assigns, to pay to the tenants the fair proportion of the value of any labour, lime, or other manure from which the crops allowed by these conditions have not been taken, provided that the tenants shall shew that such dressing is not less and in the manner hereinbefore stated; such proportions to be valued and fixed on by referees in the usual way. But, should the tenants not pay the rents and fulfil all the conditions before mentioned, or should they become bankrupt or insolvent during the said term, this agreement shall be void and of no effect, and the landlord shall be at liberty to enter and take possession of the lands and premises hereby let, and relet them to whom he may think proper, without let or hindrance from the said tenants. But, on paying the said rents and performing the said conditions, not otherwise, the said John Endle the younger, &c., &c., shall quietly enjoy and occupy the said premises for the term before mentioned. In witness," &c.

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perches of land, upon which there was a building, for which they paid the rent of 473*l.* 10*s.*, in addition to the tithes, which amounted to 28*l.* and upwards.

The building on the land was a solid two-storied stone building 89 feet long. The lower part, which was used as a feeding-place for bullocks, was closed at the two ends and back, and open in front, with pillars which supported the upper story. The upper story, which had an internal communication with the lower one, was a closed building, with door and lock, and was used as a store for the wool and corn produced and the hay and corn consumed on the estate. The whole business of the farm was conducted in this building; and the partnership had no other farm-buildings belonging to them, except a few linhays of very trifling value scattered about on various parts of the farm. The rent of the building was estimated at 6*l.*

The partnership was formed avowedly for the purpose of creating votes and making a profit out of the farm; but the votes were the principal object.

The partners appointed a manager, one of their number, who farmed the estate on their account. He grazed stock, bought bullocks, fattened and sold them, bought and sold sheep, sold their wool, and kept the accounts, which were regularly made up.

The funds which were necessary for carrying on the business of the partnership were raised by a loan of 800*l.* on the security of a bond for that amount, which was entered into by all the partners previously to July 31st, 1864.

William Hamlyn, one of the partnership, died in February, 1865, since which time rent had been paid by the partnership. The land was rented by the partnership of Elias Ford, who himself rented it of four owners. The partnership is not registered under the Companies Act, 1862 (25 & 26 Vict. c. 89).

The votes were objected to on three grounds,—first, that the building on the land was not such a building as could confer a qualification under s. 27 of the Reform Act, 2 Wm. 4, c. 45; secondly, that this partnership, consisting of more than twenty members, was an illegal association under the Companies Act, 1862, and that consequently the members of that partnership

could not enjoy the franchise, their only claim to which was founded on an illegal tenancy; thirdly, that, the partners being tenants at will of Elias Ford, on the death of one of their number the tenancy expired.

The revising-barrister overruled all these objections, and directed that the names of the forty-three voters should continue on the register.

If he was wrong in overruling any one of the objections, the names of those several persons were to be expunged: if he was right, they were to remain.

W. H. Cooke, Q.C., for the appellant. Two principal questions arise upon this case,—first, whether the forty-six persons who were parties to the agreement referred to occupied the premises as tenants within the 27th section of the Reform Act, 2 Wm. 4, c. 45,—secondly, whether the subject of occupation is sufficient to satisfy the requirements of the same section.

A mere tenancy is not enough to give a qualification: there must also be occupation, either actual or constructive, as tenant. Assuming, therefore, that the agreement is such as would render all these forty-six persons liable as tenants for the rent reserved thereby, the occupation of the farm by the manager was not an occupation by the whole of the partners, the association being an illegal one by reason of the 4th section of the Companies Act, 1862, 25 & 26 Vict. c. 89. That section enacts that "no company, association, or partnership consisting of more than *ten* persons shall be formed, after the commencement of this act, for the purpose of carrying on the business of *banking*, unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament, or of letters-patent: and no company, association, or partnership consisting of more than *twenty* persons shall be formed, after the commencement of this act, *for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership*, or by the individual members thereof, unless it is registered as a company under this act, or is formed in pursuance of some other act of parliament, or of letters-patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stan-

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naries." It is clear, therefore, that these persons could not occupy as tenants, so that an occupation by one should ensue as a constructive occupation by all the co-partners.

[BYLES, J. Does the 4th section of the Companies Act, 1862, mean anything more than that an association consisting of more than twenty persons shall not, unless registered, have the privilege of enforcing any contracts?]

The object of the statute was, to prevent these illegal associaciations. This object would be in a great degree frustrated, if the members could acquire the rights of citizens by means of the illegal combination, by appointing one of their body to occupy, so as to make his occupation a constructive occupation by themselves. In *Rex* v. *Ditcheat* (1), Littledale, J., says: "There is a material difference between a holding and an occupation. A person may hold, though he does not occupy. A tenant of a freehold is a person who holds of another: he does not necessarily occupy. In order to occupy, a party must be personally resident by himself or his family."

Then, as to the subject of qualification,—the rent of the land with the buildings is 473*l.* 10*s.* per annum, which would be 10*l.* 6*s.* (within a fraction) for each tenant; and the revising-barrister has found that the estimated value of the building was 6*l.* per annum, or about 2*s.* 9*d.* to each tenant. The agreement shews that this was a mere grazing farm; the primary subject of occupation being land. Can it be said that a building such as described, and of the insignificant value stated, satisfies the word "building" in the 27th section of the Reform Act?

Mellish, Q.C. (*Kingdon* with him), for the respondent. The first point taken on the part of the appellant is an entirely new one. All that the 27th section of the Reform Act requires, is, that there shall be an occupation as owner or as tenant de facto of a building, or of a building and land held therewith under the same landlord, of not less than the clear yearly value of 10*l.* The finding of the revising-barrister shews that that requirement is satisfied here. Whether the holding is by right or by wrong is wholly immaterial. No question of title or legality of occupation can be raised before the revising-barrister. Could it be objected, for

(1) 9 B. & C. 176, 183; 4 M. & R. 151.

instance, that the premises were hired for a gambling-house, or as a place for receiving stolen goods, or for any other immoral purpose? It would be highly inconvenient if such matters could be contested before the revising-barrister. The only question which it is competent for him to entertain, is, whether the claimant occupies as owner or as tenant a building of sufficient value to confer a vote.

[BYLES, J. My difficulty is this. There is no *actual* occupation by these persons: and to prove a constructive occupation recourse must be had to the void contract.]

The revising-barrister has distinctly found an occupation de facto by these persons, by entering into possession of the land and building,—"in pursuance of the agreement," no doubt; and he has also found that they paid the rent.

[ERLE, C.J. He finds that they had a qualification, subject to this case.]

If the occupiers had been two only, no one could have entertained a doubt that the occupation was sufficient.

[BYLES, J. Suppose a bill were filed by one of the partners for an account, would not the answer be that the partnership was an illegal one?]

It may well be doubted whether the Companies Act, 1862, was meant to apply to an association for the occupation of land for farming or grazing purposes. The mere making profit out of the occupation of land is not carrying on a business, in the ordinary sense of the term: and it clearly is not within the mischief the statute was aimed at, viz., the pretending to act as joint-stock trading companies without having complied with the rules prescribed by law. The 4th section begins with a provision as to banking partnerships: it then goes on, or "for the purpose of carrying on any other business that has for its object the acquisition of gain," &c. No object of gain was contemplated here: the avowed purpose was the acquisition of votes.

[BYLES, J. The statute excepts "mines, within the jurisdiction of the Stannaries," but not farming or grazing.]

The next question is, whether the subject-matter described is a "building" within the 27th section of the Reform Act.

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[ERLE, C.J. The Court being against you upon the first point, it is unnecessary to discuss the second.]

ERLE, C.J. In this case it is insisted that forty-six persons acquired a right to be upon the register of voters in respect of an occupation as tenants of land with a building upon it at an aggregate rent of 473*l.* 10*s.* I think the qualification is not sufficient. I am quite aware of the importance of not raising a doubt as to the illegality of the use to which the premises are intended to be applied by the occupier operating a disqualification. But that point does not arise here; for it is the statute (25 & 26 Vict. c. 89) which prohibits the contract out of which the right claimed is sought to be created. It appears that these forty-six persons have formed a partnership and become tenants of the land for the partnership purposes in direct violation of the statute. They cannot set up the agreement creating the tenancy without shewing that they have transgressed the law. I am clearly of opinion that farming and grazing are within the statute: both are businesses which have for their object the acquisition of gain. This point is sufficient to disqualify these parties; though there are other objections behind, to which it is unnecessary now to refer.

15 C.B. 259

WILLES, J. I am of the same opinion. It should seem by the 25 & 26 Vict. c. 89, s. 4, that the legislature, viewing the frauds which had been committed by large companies, and the great inconvenience which was found to arise by reason of the difficulty of enforcing claims and settling accounts between surviving members and executors of deceased members, and otherwise, have thought fit to determine that no company, association, or partnership consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company or its members, unless registered under the act. And I think it has done that by language which does not admit of any reasonable doubt. It is unnecessary to refer to authorities to shew that "business" has a more extensive signification than "trade." The earlier Bankrupt Acts did not embrace farmers: but it was never doubted that farming was a "business," though not a "trade." Banking is not strictly a trade. Where land comes to a number of persons by operation of law, they cannot be said to be partners, and they may consistently with the act

farm it. But, when we find an association like this, which is rendered illegal by an act of parliament, we cannot take notice of the agreement under which they become tenants, for the purpose of establishing a right in a court of law, or hold that the occupation by one of their body is an occupation by all the members of the illegal association. 1865 HARRIS v. AMERY.

BYLES, J. I am of the same opinion. The statute having declared the association in question to be illegal, no rights can be acquired by any of its members which are founded upon that which is so declared to be illegal. One member of the partnership only corporally occupies the property: the others can only acquire a share of it by relying upon the illegal contract. The decision of the revising-barrister was clearly wrong.

KEATING, J. I am of the same opinion, on the ground that there was no such occupation by the claimants as the 27th section of the Reform Act requires. I agree with Mr. Mellish that it would be highly inconvenient if questions as to the legality or illegality of the occupation of premises could be raised before the revising-barrister. But that is not the case here. The persons who claim to be registered have no occupation of these premises at all except by virtue of the illegal agreement.

Decision reversed.

JOHN MORISH, APPELLANT; ROBERT HARRIS, RESPONDENT. *Nov.* 20.

Parliament—Borough vote—Reform Act—"Building" within s. 27*—Description and relative value of "building" and "land," where the qualification consists of both.*

The voter occupied, at a rent exceeding 10*l.* per annum, a piece of land with a stone building, roofed, upon it. The building had four walls and a door, and was used by the tenant for keeping guano and other manures which he used upon the land:—

Held, that there was nothing in the character of the building, or in the use to which it was applied, to prevent it being such a "building" as to satisfy the requirements of the 27th section of the Reform Act, 2 Wm. 4, c. 45.

Where the revising-barrister had found that the building demised with the land was of a permanent nature, and useful for the occupation of the land upon which it was placed, and, on the case being sent back to him for amendment by stating whether the land with the building was of more real value to let than

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the land would have been without the building, further found that "the building was worth about 5s. a year to the tenant":—

Held, that, inasmuch as the building bonâ fide added to the real annual value of the land to let, though in a small degree only, the qualification was sufficient.

AT a court held for the revision of the list of voters for the borough of Totnes, Robert Harris objected to the name of John Morish being retained on the list of voters for the parish of Totnes, in the borough of Totnes, in respect of a qualification described in the list as "Building and land, in Ashprington Road."

The voter occupied a piece of land at the rent of more than 10*l.* per annum, with a stone building, roofed, upon it. The building had four walls and a door, which was kept locked. The voter kept in the building guano and other manures, which he used for the purposes of the land. The building was full.

It was objected that the structure thus described was not a "building" within the meaning of the 27th section of the Reform Act, 2 Wm. 4, c. 45.

The revising-barrister held that it was not a building within the meaning of the said section, and expunged the voter's name.

If the Court should be of opinion that his decision was wrong, the name of John Morish was to be restored to the list.

Mellish, Q.C. (*Kingdon* with him), for the appellant. If the revising-barrister in this case had meant to decide that the structure was not substantial enough to constitute a "building" within the statute, he has not given materials sufficient to enable the Court to hold his decision right. He does not state the relative value of the building and the land, nor the size of the building. This is not like the case of a shed put up by an election-agent for the purpose of manufacturing a vote; this building was upon the land at the time it was demised to the voter. Some expressions in the judgment of this Court in *Powell* v. *Boraston* (1) probably induced the revising-barrister to suppose that they meant to draw a distinction between a building for commercial from one intended to be used for agricultural purposes. But that could hardly have been in the contemplation of the Court; a building used for farming purposes is as much within the Reform Act as one intended for purposes

(1) 18 C. B. (N.S.) 175; 34 L. J. (C.P.) 73; 1 Hopw. & Ph. 179.

more strictly commercial. If a cottage had been occupied with the land for farming purposes, however small its value, that would have formed a good qualification under the act. The mere use for which the building is adapted, or to which it is intended to be applied, is immaterial. This building might come to be used for a purpose strictly commercial: for instance, if the occupant became a butcher, and stalled cattle therein. The principles upon which the decision in these cases must depend are well stated in the judgment of Tindal, C.J., in *Whitmore* v. *The Town Clerk of Wenlock* (1), which was not cited in *Powell* v. *Boraston.* (2) In that case, a cow-house or stable substantially built of brick or stone, with a tiled roof, having a door with a lock and key, and "suitable for the purpose for which it was erected and used, and conveniently placed for the occupation of the claimant's land," was held to be a "building" within the 27th section of the Reform Act. In *Powell* v. *Farmer* (3), the subject of occupation was a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground; and it was described as being used by the tenant for storing potatoes and other things connected with his business of a market-gardener: the revising-barrister having found the thing so described to be a building within the 27th section of the Reform Act, the Court held that there was not sufficient in the description which he had given to warrant them in reversing his decision. The structure in that case was a much less substantial one than that described here; and the only distinction between the two cases, is, that, in the one, the tenant was a market-gardener, in the other, a farmer.

W. H. Cooke, Q.C., for the respondent. The decision of the revising-barrister was right, and is in conformity with all the cases upon this subject. The principle which pervades them all is thus laid down by the Court in *Powell* v. *Boraston* (2):—"The legislature intended that 'building' should give the primary qualification, and that 'land' should be a secondary resort, if the building was not worth 10*l.* per annum." It is manifest from the finding of the barrister here that the appellant is not a Totnes man, and that the

(1) 5 M. & G. 9; 7 Scott, N. R. 489; 1 Lutw. 10.
(2) 18 C. B. (N.S.) 175; 34 L. J. (C.P.) 73; 1 Hopw. & Ph. 179.
(3) 18 C. B. (N.S.) 168; 34 L. J. (C.P.) 71; 1 Hopw. & Ph. 172.

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shed was not such as to give a primary qualification. It is clear also, that, though not cited in that case, *Whitmore* v. *The Town Clerk of Wenlock* (1) must have been uppermost in the minds of the Court.

[ERLE, C. J. To constitute a good qualification under the 27th section of the Reform Act, there must be a "building" first of all: if that be of insufficient value, then land may be resorted to, to eke it out.]

The revising-barrister having found this not to be a "building," there is nothing to which the land can be added to help out the insufficiency of the qualification.

[WILLES, J. The barrister says it is a building: but not a building within the 27th section of the Reform Act.]

Mellish, Q.C., was heard in reply.

There being several other cases from the same borough raising the same question, the Court desired to hear them all before giving judgment in the principal case.

JOHN GILHAM, the Younger, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows:—"The voter occupied a piece of land, at the rent of more than 10*l.* per annum, on which he grazed a cow and other cattle, with a stone building, roofed, upon it, which he used for the purpose of milking his cow in, and for keeping a pig. The building had three sides, was open in front, and had a loft over, which was not used, except for fowls to roost in. The voter was a dairyman."

CHARLES GEORGE MASON, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows:—"The voter occupied a piece of land, at the rent of more than 10*l.* per annum, on which there was a stone building, roofed. The building was a linhay, open to the field. There was a crib in it. One side of the linhay was prolonged, and formed the back of a large tank which contained from sixty to eighty hogsheads of water. The roof of the tank was lower than that of the linhay. The water flowed from the roof of the linhay into the tank. There was an internal communication between the linhay and the tank. The water was used

(1) 5 M. & G. 9; 7 Scott N. R. 489; 1 Lutw. 10.

to water the cattle which fed upon the land, and was drawn from the tank by means of a ball."

JOSEPH ADAMS, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows :—"The voter occupied a piece of land of the value of more than 10*l.* per annum, with a stone building, roofed, upon it. The building had three walls, and was open in front. There was a loft over the building for the purpose of keeping hay. The land was used for depasturing *the voter's own cattle*, and the lower part of the building was useful as affording shade and shelter to the cattle."

JAMES BENNETT PROUT, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows :—"The voter occupied a piece of land, with a stone building upon it, roofed, of the value of more than 10*l.* per annum. The building had three walls, and was open in front, with a loft over, for the purpose of keeping hay. The land was used by the voter for the purpose of depasturing *other people's cattle*, and the lower part of the building was useful as affording shade and shelter to them."

JEFFERY BERRY, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows :—"The voter occupied a piece of land at the rent of more than 10*l.* per annum, with a building upon it. The building had three stone walls and a roof, and was open in front. The land was used for grazing *the voter's cattle*, and the building was useful as affording shade and shelter to them."

THOMAS WILLIAM HODGE, Appellant; ROBERT HARRIS, Respondent.

The subject of occupation was described as follows :—"The voter occupied a piece of land, with a building on it, at the rent of more than 10*l.* per annum. The building had three stone walls and a roof, but was open in front. The land was used by the voter for the purpose of taking in *other people's cattle* to graze; and the building was useful in affording shade and shelter to them."

The same counsel appeared for the respective parties in each case; but there was no argument, it being agreed that there was no substantial distinction between them.

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The judgment of the Court (Erle, C.J., Willes, Byles, and Keating, JJ.) in the first case was delivered by

ERLE, C.J. According to the statement of this case, the building now in question was not deficient in respect of form and durability, and it was used for the purpose of keeping guano. It was suggested on the argument that the revising-barrister decided against the qualification, because the guano was to be applied to the claimant's own farm, and the building was used solely for an agricultural purpose, and that, in thus deciding, he intended to follow an opinion of this Court supposed to have been expressed in the case of *Powell* v. *Boraston*. (1) In that case we held that a few boards nailed to some posts, for the sole purpose of pretending to the revising-barrister that it was a shed, did not qualify; and we dissented from the opinion expressed in 2 Lutwyche, p. 58, "that any building, however slight and unsubstantial, would be sufficient to qualify, provided it had a roof, and was capable of holding any articles:" see 18 C. B. (N.S.) 181. We drew attention to the words of the statute to which we and the revising-barristers have to give effect, and under which we are bound as much to prevent lawful votes from being neutralized by fictitious pretences, as to support the franchise where the legislature has given it: and we came to the conclusion "that the pretence of a shed was not a building within the residentiary class, or in the class connected with commercial industry to which the statute related."

In this language, we did not mean to contradistinguish commercial from agricultural industry, so as to exclude agriculture. On the contrary, in applying this statute, we consider that an agriculturist carries on at the same time what may be termed a commercial business, using the word commercial in its widest extension, and taking all products of industry having value to be subjects of commerce; and that a building really used or intended to be really used for the purpose of keeping such products may qualify, whether they are intended for home consumption or for exchange: see *Whitmore* v. *The Town Clerk of Wenlock*. (2)

Then, as the building now in question appears to have been really used for warehousing guano, we are of opinion that it was

(1) 18 C. B. (N.S.) 175; 34 L. J. (C.P.) 73; 1 Hopw. & Ph. 179.

(2) 5 M. & G. 9; 7 Scott, N. R. 489; 1 Lutw. 10.

sufficient to qualify, so far as its use was concerned; and the decision to the contrary is reversed.

With respect to the other cases from the borough of Totnes, we are unable without further information to come to a decision. We therefore send them back to the revising-barrister, and would thank him to answer the following question at his earliest convenience,—"Is the land with the building of more real value to let than it would be without the building?" In answering this question, all notions of value for a vote are to be excluded.

The descriptions of the buildings are not the same in each of these cases: and the revising-barrister may adapt his answer accordingly, if he thinks there is any substantial difference between them in respect of value.

The cases having accordingly been sent back to the revising-barrister for amendment, he returned them with the following additional findings:—

Gilham's Case,—"The building was worth about 10*s.* a year to the tenant."

Mason's Case,—"The linhay was worth to the tenant about 5*s.* a year. The value of the tank was not proved, but it was worth something."

As to each of the other cases,—"The building was worth about 5*s.* a year to the tenant."

Cur. adv. vult.

Jan. 31. KEATING, J., delivered the further judgment of the Court:—

In the remaining registration cases from the borough of Totnes, we have had considerable difficulty in arriving at a satisfactory decision. The statute describing the qualification for a borough vote, according to our construction, requires, amongst other things, that there should be a building having some permanence, some utility, and some real value, but does not define either the form or materials essential for permanence, or the kind of utility intended; nor does it specify the proportion which the value of the building should bear to the value of the land, where the amount of 10*l.* is made up partly by building and partly by land. Looking to the statements in the several cases, and the return of

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the revising-barrister to the question put to him, it appears that the buildings in question are of a permanent nature, that they are useful for the occupation of the land upon which they are placed, and bonâ fide add to its real annual value to let, though in a small degree. If, under these circumstances, we held that they were insufficient, it seems to us that we should be defining what the legislature has left indefinite, and should be doing an act of legislation, when the powers intrusted to us authorize interpretation only. We feel ourselves, therefore, constrained to hold that the qualification in each of these cases was sufficient, and that consequently the decision of the revising-barrister must be reversed.

We think it right, however, to add, in justice to the revising-barrister, that the consideration of this question has caused much discussion amongst us, and that the opinion of more than one member of the Court upon the true construction of the statute has undergone a change.

In pronouncing this decision, we do not intend to interfere with the discretion of revising-barristers in deciding whether a building by means of which it is sought to qualify fulfils the requirements which we think the statute imposes, viz., permanence, utility, and contribution to the beneficial occupation of the land, thereby increasing its real annual value to let: nor do we mean to lay down as a rule that all buildings of the present value as returned by the revising-barrister necessarily give a qualification, unless that value be bonâ fide combined with permanence and utility, and thereby add to the real annual value of the whole to let.

The decision of the revising-barrister, therefore, in each of these cases will be reversed.

Decisions reversed.

[END OF REGISTRATION CASES.]

[IN THE EXCHEQUER CHAMBER.]

MALLET *v.* BATEMAN.

Nov. 29.

Statute of Frauds, 29 *Car.* 2, *c.* 3, *s.* 4—*Contract to answer for the debt or default of a third person—Guarantee.*

The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that, if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill "without recourse," in other words, buy the bill of him:—

Held,—affirming the judgment of the court of Common Pleas,—that this was a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3.

THIS was an appeal against a decision of the court of Common Pleas, making absolute a rule to enter a verdict for the defendant, on the ground that the contract upon which the action was brought should have been in writing, under the Statute of Frauds: see 16 C. B. (N. S.) 530; 33 L. J. (C. P.) 243. The following were the facts of the case:—

1. The plaintiff is a civil engineer, and the patentee of certain buckle plates used for bridge flooring. The defendant is an iron-broker in London.

2. The plaintiff was desirous of selling certain buckle plates to certain persons named Calvert & Co., of York, and a correspondence took place on the subject between the plaintiff, Calvert & Co., and the defendant, which resulted in two contracts made by the defendant as broker, for Calvert & Co., for a quantity of plates, upon the terms of payment in cash.

4. The plaintiff was desirous of invoicing the plates to the defendant, and of receiving payment through him; but the defendant replied that the invoices must be made out to Calvert & Co., and sent to them direct; and accordingly the invoices were so made out and sent by the plaintiff.

5. The plaintiff experienced great difficulty in getting cash from Messrs. Calvert for the plates as they were delivered from

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time to time; and a further correspondence ensued between the plaintiff and Calvert & Co., which seems to have resulted in nothing satisfactory.

6. The plaintiff called on the defendant and told him the difficulty he experienced in getting paid, and that he was reluctant to deliver any more iron. The defendant admitted that the Messrs. Calvert were pressed for money; and he offered to cash their acceptance given in respect of two invoices, numbered 4 and 5, amounting to 246*l.* 15*s.* 4*d.*, for 3 per cent. upon the amount, and to give the plaintiff a written guarantee against all demands on foot of that bill, *and to do the same by the remainder of the plates*, that is, the plates not then delivered. It was then arranged that they should meet again.

7. On the 14th of December the plaintiff wrote to Calvert & Co. as follows:—

"14th December, 1861.

"Messrs. Calvert & Co.—Dear Sirs,—I have yours of the 13th instant. I can only consent to draw as you proposed therein for the amount of the invoices numbered 4 and 5, 246*l.* 15*s.* 4*d.*, and overdue, upon condition that you add 3 per cent. to the amount of the invoices, which is what your non-fulfilment of the agreed cash payment costs me. If I hear from you by return agreeing to this, and stating that your acceptance will be returned without delay to me, indorsed by Mr. F. W. Calvert, I will draw for the full amount as above, not otherwise.—Robert Mallet."

8. On the 16th of December, the plaintiff again saw the defendant, and the defendant then agreed to give cash for Calvert & Co.'s bills for all the buckle plates, that is, those delivered and those not delivered, and to legally and fully exonerate the plaintiff as drawer or indorser from further liability, on payment of 3 per cent. on the amount. The plaintiff was to see the defendant as soon as he should hear from Calvert & Co. in reply, and to draw on them at one month. In the course of this interview the plaintiff had said, speaking of the plates not then delivered, "What is to be done about them? Under present circumstances I shall not deliver them, unless I am secured. Either I am paid cash, or I do not give up the iron until I am secured." The defendant then said *he would do the same by all the remainder of the plates up to*

the conclusion of the order, or the contract; to which the plaintiff assented.

9. On the same day, the following letter was written by the defendant to Calvert & Co.:—

"London, 16th December, 1861.

"Messrs. G. J. Calvert & Co.—Dear Sirs,—Mr. Mallet was here to-day, and he will draw at one month for the buckle plates now at station; and if the rest are taken as soon as ready, he will also draw at a month for the balance. I think this had better be done, and you had better write him to push on and deliver all the order off hand.—Bateman & Co."

Calvert & Co. on the same day addressed the following letter to the plaintiff:—

"York, 16th December, 1861.

"Mr. R. Mallet.—Dear Sir,—In reply to your favour of the 14th instant, we beg to state that, if you will draw at one month from 17th instant, we will agree to your adding the 3 per cent. The bill shall be returned immediately, with Mr. F. W. Calvert's indorsement.—G. J. Calvert & Co."

10. The plaintiff accordingly, on the 17th of December, 1861, drew a bill on Calvert & Co. for 254*l.* 3*s.* 1*d.*, which included the 3 per cent.; and on the 18th of December, Calvert & Co. sent the bill back to the plaintiff, accepted and indorsed, as required, by F. W. Calvert.

11. On the 19th of December, 1861, the plaintiff took the draft for 254*l.* 3*s.* 1*d.* to the defendant, and proposed to indorse it over to him "sans recours." The defendant objected that this would prevent his using the bill without destroying Calvert & Co.'s credit, and suggested that the plaintiff should indorse it simply, and offered to give him any legal indemnity that the plaintiff's lawyer should suggest, as against himself or any third party, or any further liability on the bill. The plaintiff assented, and handed the bill to the defendant after indorsing it, and received from him a cheque for the amount, less 3 per cent., and the following undertaking was signed by the defendant:—

"Robert Mallet, Esq. In consideration of 3 per cent. upon the amount of Messrs. Calvert & Co.'s acceptance dated 17th December, 1861, at one month, for 254*l.* 3*s.* 1*d.*, bought by us this day,

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and which at our request you have simply indorsed, omitting the words 'sans recours,' we hereby guarantee to hold you harmless as against all liability upon said bill, either to ourselves or to any third party. Bateman & Co."

12. The plaintiff then told the defendant he would not deliver the remainder of the plates to Calvert & Co. on that mode of payment, and that for the bill to be given for future balances he must have such document, if he should simply indorse Calverts' bill, as should under legal advice free him from all suspicion of risk; to which the defendant agreed, and directed the plaintiff to complete the order.

13. At one of the above interviews, the plaintiff expressed his doubts of Calvert & Co.'s solvency; and the defendant said he was amply secured, and that Calverts would not fail at present.

14. On the 20th of December, 1861, Mallet, writing to Calvert & Co. as to plates in progress, observed: "If you are prepared to pay for these in cash, as per our agreement, I should greatly prefer it: if not, however, I should not object to take your acceptance for them, with 3 per cent. added to the amount of invoices, and indorsed by F. W. Calvert, at one month's date from delivery of invoice." To this Calvert & Co. replied on the following day,—"As to future payments, you must draw on us at one month, as you have done."

15. On the 3rd of January, 1862, the plaintiff drew on Calvert & Co. for 603*l.* 14*s.* 10*d.*, and inclosed the draft to them in the following letter:—

"3rd January, 1862.

"Messrs. G. J. Calvert & Co.—Dear Sirs,—I annex invoice No. 6 for 679 patent buckle plates marked T. B., order 30th August, 1861, being the completion of order for Thames Bridge, as then given, amount 586*l.* 3*s.* 2*d.* net cash on receipt of invoice. I also inclose the delivery receipt of the London and North Western Railway Company for those plates now at Darleston Station. In accordance with your request, I now inclose my draft at one month from this date for 603*l.* 14*s.* 10*d.*, being the above amount, with 3 per cent. added, for your acceptance payable at Glyn's and indorsement of Mr. F. W. Calvert, and will thank you to return same to me completed at your earliest convenience,

when my order for your receiving the buckle plates will be forwarded to you. Robert Mallet."

Calvert & Co. returned the draft duly accepted, and indorsed by F. W. Calvert, in a letter of the 4th of January, 1862.

16. The plaintiff received the draft back on the 6th of January, 1862, and on the afternoon of the 7th took it to the defendant's office after 5 o'clock, but found no one there.

17. Calvert & Co. stopped payment on the 20th of January, 1862; and on the 22nd of January the plaintiff took the bill for 603*l.* 14*s.* 10*d.* to the defendant, and required him to cash the same, which the defendant refused to do, *on the ground that Calvert & Co. had stopped payment since the plaintiff received the bill, and that the plaintiff had delayed bringing it to the defendant.*

18. The plaintiff swore, that, at the time he so took the bill, he did not know of Calvert & Co.'s stoppage.

19. The plaintiff also stated, that, when he first made arrangements with Calvert & Co. to take these bills, he told the defendant what his correspondence had been with Calvert & Co. about payment.

20. This action was brought against the defendant for breach of promise in not cashing or discounting the said bill, in accordance with his promise.

21. At the trial, it was, amongst other things, objected on the part of the defendant that he was not liable on the first count (1),

(1) The first count stated, that, in consideration that the plaintiff would sell and deliver to certain persons trading under the firm of G. J. Calvert & Co., certain goods, to wit, buckle plates, which they had ordered and contracted to buy of the plaintiff, without the plaintiff requiring payment in cash for the prices of the same on the delivery thereof, and would take from them their acceptance to a bill of exchange drawn by the plaintiff upon and directed to them, for the payment of the prices of the said goods to the plaintiff's order one month after the date thereof, and would indorse and deliver the same to the defendant, and would permit the defendant to deduct from the amount of the said bill a certain sum, to wit, at the rate of 3*l.* per cent. on the amount of the money payable by the said bill for his cashing or discounting the same and indemnifying and protecting the plaintiff as thereinafter mentioned, the defendant promised the plaintiff to cash or discount the said bill for the plaintiff, and indemnify and protect him from the payment thereof: that the plaintiff thereupon sold and delivered to the said G. J. Calvert & Co. the said goods without requiring payment in cash on delivery, and took from them their acceptance to a bill of exchange drawn

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as the contract ought to have been in writing, under the Statute of Frauds, 29 Car. 2, c. 3, s. 4. Erle, C.J. reserved leave to the defendant to move to enter a verdict for him on the first count, if the Court should be of opinion that the contract was one which the statute required to be in writing,—the Court, if necessary, to have power to amend on any terms they might think fit. A verdict was thereupon taken for the plaintiff on the first count for 586*l.* 3*s.* 2*d.*, and for the defendant on the money counts.

A rule was accordingly obtained to enter a verdict for the defendant on the first count, and afterwards made absolute: see 16 C. B. (N. S.) 530; 33 L. J. (C. P.) 243.

The plaintiff appealed; and the question for the opinion of the court of appeal was, whether or not the contract upon which the action was brought was required to be in writing, under the Statute of Frauds. If the Court should be of opinion in the negative, the verdict was to be entered for the plaintiff on the first count of the declaration, for 586*l.* 3*s.* 2*d.* If the Court should be of opinion in the affirmative, the verdict was to be entered for the defendant on that count.

The case was argued in the Exchequer Chamber, before Pollock, C.B., Channell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

Coleridge, Q.C. (*Prentice* with him), for the plaintiff. The court below were wrong in holding that this was a contract which, by the 4th section of the Statute of Frauds, was required to be in writing. It was not a contract or promise to answer for any debt or default of Calvert & Co., but a mere purchase by Bateman from Mallet of Calvert & Co.'s acceptance. At the time the defendant refused to discount the bill, there was no existing debt due from

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by the plaintiff upon and directed to the said G. J. Calvert & Co. for the payment of 603*l.* 14*s.* 10*d.* the prices of the said goods, to the plaintiff's order, one month after the date thereof; and that, although the plaintiff was ready and willing to allow the defendant to make the said reduction, &c., and all things had happened &c., to entitle the plaintiff to a performance by the defendant of his said promise, and to have the said bill cashed or discounted by him &c., yet the defendant refused to cash or discount the said bill, or to indemnify the plaintiff, &c.

Calvert & Co. The terms of dealing between them and the defendant had been settled by the correspondence. Instead of cash, the payments were to be made by bill, which bill suspended the liability of Calvert & Co. until it arrived at maturity. A refusal on the part of Calvert & Co. to give a bill would not have entitled Mallet to sue them for the price of the goods, but would only have rendered Calvert & Co. liable to a special action for not accepting the bill.

[BLACKBURN, J. Is it essential that there should at the time have been an existing debt of Calvert & Co., capable of being immediately enforced? If A. holds an acceptance of B., not yet due, and C. promises to pay it at maturity if the acceptor does not, surely that is within the statute.]

The liability of the defendant arose, according to the understanding of the parties, before any liability arose on the part of Calvert & Co. The substance of the transaction was this: Bateman says to Mallet, "If you will furnish the plates to Calvert & Co., without insisting upon immediate payment, and will take their bill at one month, I will discount it at 3*l.* per cent."

[BLACKBURN, J. Without recourse against any party.]

That, it is submitted, is no promise to answer for the debt or default of Calvert & Co. The defendant had a great interest in the performance of the work by Calvert & Co., and the plaintiff parted with his lien on the goods, as well as with his claim on his vendees.

[BLACKBURN, J. Is not a promise to give a guarantee as much required to be in writing as a guarantee itself?

POLLOCK, C.B. This is nothing more than a promise to indemnify the holder against the default of the acceptor. I think it is clearly within the statute.]

So to hold will be pushing the Statute of Frauds much further than it has ever yet been carried.

[POLLOCK, C.B. Honestly applying it, rather, and not allowing a subtle device to prevail to take a case out of the statute. Every contract which deviates in any degree from the common ought to be in writing.]

It has been frequently held that a contract for the equitable assignment of a debt need not be in writing.

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[POLLOCK, C.B. Would a parol promise to buy a bond be binding?]

It is submitted that it would, but it is enough to say that that is not this case.

[BLACKBURN, J. The only question is whether a bargain such as that stated in the 11th paragraph of the special case would, if made by word of mouth, be binding.]

Is it a contract or promise to answer for the debt or default of another person? The bill is spoken of as a thing "bought" by Bateman. He undertakes to stand in the vendor's position. In Story on Contracts, 4th edit. p. 398, s. 861, it is said: "The statute only applies to collateral engagements, that is, to engagements upon which the guarantor is only conditionally liable, upon the default of some other person who is solely liable originally." Upon this contract it is plain that Calvert & Co. could not remain liable to Mallet. It was an original contract by Bateman, in consideration of certain advantages which would accrue to him from the performance of Mallet's contract with Calvert & Co.

Sir G. Honyman (*Watkin Williams* with him), for the defendant, was not called upon.

POLLOCK, C.B. We are all of opinion that it is unnecessary to hear the counsel for the defendant. My brother Blackburn has, in the course of the argument, stated that which appears to me to dispose of this case, viz., that a contract to give a guarantee is required to be in writing as much as a guarantee itself. If we were to hold that a contract of guarantee must be in writing, but that a contract to give a guarantee need not, we should, I think, be committing the same mistake as our predecessors did with reference to the Statute of Uses. The object of that statute was, that the possession should go along with the use; but a construction was early adopted whereby the possession should go to A. in trust for B., and so the effect of the statute was simply to add a few words to the conveyance. Whether the decisions of the courts of equity as to uses and trusts were beneficial or not, I do not stop to inquire; but undoubtedly the whole doctrine arose out of a desire to frustrate the intention of the Statute of Uses. I trust we shall not commit a similar mistake in construing the

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statute now under consideration. The real question here is, whether the contract declared upon is not substantially a contract that, if Calvert & Co., the buyers of the goods, do not pay for them at the expiration of the month's credit, the defendant will indemnify the plaintiff against their default. In consideration of a discount of 3 per cent., the defendant undertakes to hold the bill without recourse to the plaintiff. That is, in substance, an engagement by which the buyers of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the Statute of Frauds. Upon this short ground, we are all of opinion that the judgment of the Court below should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Kempson & Trollope.*
Attorneys for defendant: *Thomas & Hollams.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 29.

IRWIN *v.* SIR GEORGE GREY, BART.

Error in fact—Error in law—Summoning special jury, and calling over the panel—Mis-trial.

It is no ground of error, either in fact or in law, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 A.M., the time for which the special jurors were summoned,—it not being competent to the party to aver anything that is inconsistent with the record.

Semble, that error lies to the Exchequer Chamber upon a judgment on error in fact in the court below.

THIS was an action against the defendant, one of her Majesty's principal Secretaries of State, for having, in breach of his duty as such secretary, neglected to submit to her Majesty a petition presented by the plaintiff pursuant to the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34.

The cause came on for trial before Erle, C. J., at the sittings at Westminster after Michaelmas Term, 1862, when the plaintiff was nonsuited. In the following term, the plaintiff moved for a new

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trial, on the ground that the whole of the special jurors struck were not summoned, and that the special jury panel was called over before 10 A.M., the time for which the summonses had issued, and that, in consequence of a sufficient number of special jurors not being in attendance, a tales was prayed, and two talesmen were sworn, to make up a full jury. The Court refused the rule, Williams, Willes, and Keating, JJ., giving no reasons; but Erle, C.J., intimating that, the application being to the discretion of the Court, they were bound, before they entertained it, to see that the plaintiff had a good cause of action, which unquestionably he had not.

The plaintiff thereupon brought error in the Exchequer Chamber, but was there met by the objection that that which he complained of was, if erroneous, only ground of error coram nobis, which was not cognizable in the Exchequer Chamber. He then brought error in fact, which was argued in the Common Pleas at the sittings in banc after Trinity Term, 1865, when that Court decided, after time taken to consider, that there was no error in fact; the omission to summon all the special jurors, and calling over the panel before 10 A.M., being no ground of error in fact, but at most only ground for postponing the trial or for an application to the equitable jurisdiction of the Court, if the plaintiff had sustained any real injustice by the course pursued: see 19 C. B. (N.S.) 585; 34 L. J. (C.P.) 313.

Upon this decision the plaintiff brought error in law in the Exchequer Chamber, relying upon the following points,—1. That all the special jurors who were struck ought to have been summoned,—2. That the special jury struck ought to have been the jury returned for the trial of the issue in this cause,—3. That a tales can only be prayed when the jury are in default by not appearing, which they are not if they have not all been summoned,—4. That, the issue not having been tried by a duly constituted jury, the verdict is not binding, is a nullity, and the judgment founded on it is erroneous,—5. That the names of the special jurors were not called over at or after 10 o'clock, the hour named in the summons,—6. That the error assigned does not contradict the record, which is silent as to a special jury having been struck,—7. That the matters assigned as error were causes of

error, and not merely irregularities,—8. That, if there had been waiver, the defendant should have pleaded it.

The case was argued in the Exchequer Chamber, before Pollock, C.B., Bramwell and Channell, BB., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

Hannen (with him *The Attorney* and *Solicitor General* and *T. Jones*), for the defendant in error, submitted that the errors assigned being only errors in fact, were not cognizable in this court, no appeal lying from the decision of the court below upon error in fact.

The plaintiff, who appeared in person, contended that the defendant not having taken issue on his assignment of errors, it became error in law.

[POLLOCK, C. B. If the error assigned below was that an infant had appeared by attorney, which would be error in fact, and the court below decided that it was not error, that which was error in fact in the court below would by their erroneous decision become error in law, because the record would be wrong. The question for us to consider is, whether that which is complained of, viz., that the jury were not properly summoned and sworn, was substantially error in fact, or a mere irregularity. Unless there is some authority on the point, we must hear the plaintiff.]

The plaintiff then proceeded to argue at great length the several points upon which he relied, his contention being, in substance, that he was entitled to have the whole of the special jurors who had been struck summoned, in order that he might have the chance of a competent jury; that the trial under the circumstances was a nullity, and the judgment founded thereon erroneous; that the matters assigned for error did not contradict the record, and were not mere irregularities which might be waived; and that, assuming they were capable of waiver, a party cannot waive that of which he cannot at the time have knowledge. He referred to the following authorities:—Year Book, 17 E. 3, fo. 50; *Blodwell* v. *Edwards* (1); *Crowder* v. *Rooke* (2); *Rex* v. *Franklin* (3); *Rex* v. *Perry* (4); *Holt* v. *Meddowcroft* (5); *Hague* v. *Hall* (6);

(1) Cro. Eliz. 509.
(2) 2 Wils. 144.
(3) 5 T. R. 454.
(4) 5 T. R. 453.
(5) 4 M. & Sel. 467.
(6) 5 M. & G. 693; 6 Sc. N. R. 705.

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Dunn v. *Cox* (1); *O'Connell* v. *Reg.* (2); *Newman* v. *Graham* (3); *Rogers* v. *Smith* (4); *Haldane* v. *Beauclerk* (5); *Montague* v. *Smith* (6); *Curtis* v. *Marsh* (7); Vin. Abr. *Error* (K. c.); (L. c.), pl. 8; and the Jury Act, 6 G. 4, c. 50, ss. 30—37.

The Court retired to deliberate; and, on their return,

POLLOCK, C.B., said: We are all of opinion that it is not necessary to hear counsel on the other side. The fact that some of the jury struck were not summoned might be a ground for postponing the trial, or granting a new trial, under some circumstances; and it ought to have been complained of (if at all) in the court below, on motion. So, of the other matters objected to by the plaintiff, we are all of opinion that they cannot be assigned as error in a court of law.

The cases cited prove that the court in which an irregularity has occurred will correct it. But no case has decided that a mere irregularity in practice, assuming these to be such, can be made the ground of reversing a judgment.

We think the judgment must be affirmed.

Judgment affirmed.

Attorneys for defendant: *Raven & Bradly.*

(1) 16 M. & W. 439.
(2) 11 Cl. & F. 155.
(3) 11 C. B. 153.
(4) 1 Ad. & E. 772.
(5) 3 Ex. 658.
(6) 21 L. J. (Q. B.) 73.
(7) 3 H. & N. 866; 28 L. J. (Ex.) 36.

WIGAN, APPELLANT; STRANGE, RESPONDENT. *Nov.* 17.

Theatre—Entertainment of the stage, within 6 *&* 7 *Vict. c.* 68*—Ballet divertissement—Music and dancing licence, under* 25 *Geo.* 2, *c.* 36.

The respondent represented, at a place of public entertainment in London called the Alhambra, which was licensed only for music and dancing under the 25 Geo. 2, c. 36, an entertainment called a "ballet divertissement," which was thus described by a police magistrate in a case stated for the opinion of this Court, under the 20 & 21 Vict. c. 43:—

"There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side-lights, a curtain, side-scenes, drops, and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, painted to represent rocks, with a cascade of water falling among them from a place thirty feet high. On the wings and at the scenes at the back are painted palm-trees: the whole representing an oriental landscape. From sixty to seventy females, in the ordinary costume of theatrical ballet-dancers, came through a large opening at the top of the platform painted as rocks, and danced down them to the stage. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down, they defiled to the right and left. Four were placed on each side in front of the proscenium, with sham musical instruments in their hands, supposed to be played by them to the dancers. The dancers began to dance the pas des poignards (a dance which was originally brought out at Drury Lane Theatre, in an Egyptian scene), each female armed with two daggers, charging through each other's ranks, striking right and left with the daggers in mimic warfare, then in front as far as the foot-lights. This performance of the dagger-dance ended in several of the females standing over others as if in triumph, and retiring, when others came forward, holding palm-leaves in their hands, and danced, waving them, and formed an avenue, as if expecting an arrival; then a female dancer, who at regular theatres would be called a première danseuse, passed down the avenue formed by the other dancers, who retired, while she performed a pas seul, with gestures:"—

Held, that, upon this statement, the Court could not hold, as a matter of law, that the performance thus described was an "entertainment of the stage," within the 23rd section of the 6 & 7 Vict. c. 68.

The majority of the Court, however, thought that, if they were dealing with it as a matter of fact, it would be.

THIS was a summons under the act for the regulation of theatres, 6 & 7 Vict. c. 68, ss. 2, 23, on a complaint by Horace Wigan against Frederick Strange, that he the said F. Strange, on the 20th May, 1865, at a certain house and place of public resort called the Royal Alhambra Palace, Leicester Square, &c., did

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unlawfully have and keep the said house and place of public resort for the public performance of stage-plays, without authority by virtue of letters-patent from her Majesty or any of her predecessors, and without licence from the lord chamberlain of her Majesty's household for the time being. Upon the hearing before Mr. Tyrwhitt at the Great Marlborough Street police-court on the 2nd of June, 1865, the following facts were proved:—

1. The Alhambra has an extensive and lofty interior, to which in evenings the public is admitted on payment at the doors.

2. It is a place of public resort not licensed by the lord chamberlain: but it is licensed for music and dancing, by the county justices, under 25 Geo. 2, c. 36. What would be the pit in an acknowledged theatre is there a large space occupied by tables, at which refreshments are served. In the place where boxes are in an acknowledged theatre are places resembling private boxes and balconies, with a reserved part like stalls, all which are for the use of spectators.

3. There is an orchestra with a full band of musical performers, a stage and proscenium, lighted by foot and side-lights, a curtain called a tableau curtain, wings and grooves for scenes to stand in, lowered from above and fixed below. There are side-scenes composed of many pieces, with drops and flies.

4. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, and are painted to represent rocks. A cascade of water falls among them from a place thirty feet high. On the wings and the scenes at the back are painted palm-trees. The whole representing an oriental landscape, with a waterfall among rocks.

5. Sixty to seventy females dressed in the ordinary costume of theatrical ballet-dancers, came down through a large opening at the top of the platform painted as rocks, and danced down them to the stage. They were not dressed alike. Some had gold-tissue skirts over white. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage, till all had come down. When all were down, they defiled to the right and left. Four were placed on each side in front of the proscenium, with property, viz., sham musical instruments, in their

hands, supposed to be played by them to the dancers. The dancers began to dance the pas des poignards, each lady armed with two daggers, charging through each other's ranks, striking right and left with the daggers in mimic warfare, then in front as far as the foot-lights.

6. This performance of the dagger-dance ended in several of the females standing over others as if in triumph, and retiring, when others came forward holding property, viz., sham palm-leaves, in their hands, and danced waving them, and formed an avenue, as expecting an arrival. Then, a lady dancer, who at regular theatres would be called la première danseuse, passed down the avenue formed by the other dancers, who retired while she performed a pas seul with gestures. The other dancers then formed groups, placing the palm-leaves so as to represent the opening of a flower. Others had a property called a pallisade, and danced with it so as to represent a basket of flowers. Several more pas seuls having been executed by the première, the rest went through other evolutions, and the performance concluded.

7. This performance is in the theatrical profession called a "ballet divertissement," and could not be presented as such without the stage accessories above described. Without them it would be mere rehearsal. A witness from the lord chamberlain's office, called a reader of plays, styled it "an entertainment of the stage." A "ballet d'action" has a story; a "ballet divertissement" has none, but cannot be performed without pantomimic action and gestures. It is not confined to the steps of the dancers. Dancing quadrilles on the stage would be without such gestures. This dagger-dance was brought out originally at Drury Lane Theatre, being there danced by Almas in an Egyptian scene, as at the Alhambra in an Oriental.

8. A "ballet divertissement" can be described, so as to enable a copy of the directions for it to be sent to the lord chamberlain according to the 6 & 7 Vict. c. 68, s. 12. The ballet of "Ondine," with all its details, has been so described. The lord chamberlain has not required copies of the directions of such ballets to be sent in till recently. He has interfered at the Italian Opera where complaints have been made of the costumes of the female ballet-dancers.

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9. On the 11th of January, 1865, the same magistrate convicted the defendant on nearly similar evidence, after considering the 10 Geo. 2, c. 28, s. 2, 25 Geo. 2, c. 36, s. 2, *Gallini* v. *Laborie* (1), and *Rex* v. *Handy*. (2) That conviction was quashed by the Middlesex quarter sessions in April, 1865.

10. The complainant, being dissatisfied with the result, applied for the present summons, on evidence of another performance at the Alhambra at a later date; and the magistrate, after hearing counsel for the defendant, thought it his duty to act in conformity with the decision of the quarter sessions, though he himself entertained a different opinion of the law, and dismissed the summons, but granted a case under the 20 & 21 Vict. c. 43.

The question for the opinion of the Court was, whether the performance above described was legal, without the licence of the lord chamberlain.

T. Atkinson, Serjt. (*F. A. Bosanquet* with him), for the appellant. The performance described in the case is an "entertainment of the stage," within the 10 Geo. 2, c. 28, and required a licence under the 6 & 7 Vict. c. 68, s. 2. The history of the several enactments upon this subject is given in a note to the case of *Rex* v. *Neville*. (3) It appears that the 10 Geo. 2, c. 28, was introduced for the purpose of explaining and amending a former act of 12 Ann, st. 2, c. 23, and for regulating dramatic entertainments. After the passing of that act, music and dancing in public came under the notice of the legislature, and this led to the passing of the 25 Geo. 2, c. 36, the 2nd section of which prohibited the keeping of any place for "public dancing, music, or other public entertainment of the like kind, without a licence from the justices at quarter sessions. There was also an act of 28 Geo. 3, c. 30, which enabled the justices at sessions to license theatrical entertainments for a limited time. The 10 Geo. 2, c. 28, and 28 Geo. 3, c. 30, were repealed by the 6 & 7 Vict. c. 68, the 2nd section of which prohibits the keeping of any house or other place of public resort for the public performance of stage-plays, without letters-patent or licence; and by the interpretation clause, s. 23, the word "stage-play" is to include "every tragedy, comedy, farce, burletta, interlude, melo-

(1) 5 T. R. 242. (2) 6 T. R. 286. (3) 1 B. & Ad. 489, 497.

drama, pantomime, or other entertainment of the stage, or any part thereof." The 11th section imposes a penalty on persons performing any part in any stage-play in an unlicensed house. There are several stringent provisions in the act giving the lord chamberlain control over the theatres so licensed and the performances therein. The entertainment in question, which the defendant claims to be entitled to give under the licence for music and dancing granted to him by the magistrates under the 25 Geo. 2, c. 36, is clearly an "entertainment of the stage," within the prohibition of the 6 & 7 Vict. c. 68. The facts of the case are almost identical with those in *Gallini* v. *Laborie* (1), where it was held that no action could be maintained against the defendant for the breach of an engagement to dance at a theatre in London not licensed by the Lord Chamberlain. The case of *Gallini* v. *Laborie* (1) was cited in *De Begnis* v. *Armistead* (2), and acted upon by the court; and the propriety of the decision is not impugned by the case of *Rex* v. *Handy*. (3) It was also cited without disapprobation in *Day* v. *Simpson*. (4) The last named case differs in its facts from this, inasmuch as there there was a dialogue and a plot; but stress is laid in the judgment upon the performance being accompanied by all the accessories of the stage. In *Russell* v. *Smith* (5), the court of Queen's Bench held that, where the thing represented is of a dramatic character, moving "terror and pity and sympathy, by presenting danger and despair and joy, and maternal and conjugal affection," &c., it comes within the protection of the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15.

[ERLE, C.J. In *Gallini* v. *Laborie* (1), and *De Begnis* v. *Armistead* (2), the contracts were, to perform in a ballet, as part of an Italian opera.]

The ballet is no part of the opera; it is a separate and independent performance. In the Encyclopædia Britannica, a ballet is described as "a dramatic representation composed of dancing and pantomime guided by music." The word is similarly described by Webster and by all the other lexicographers. The lord chamberlain would

(1) 5 T. R. 242.
(2) 10 Bing. 107; 3 M. & Scott, 511.
(3) 6 T. R. 286.
(4) 18 C. B. (N. S.) 680; 34 L. J. (M. C.) 149.
(5) 12 Q. B. 217.

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have no power to interfere, as the case finds he has done, with entertainments of this sort, if the Court hold that the magistrates' licence is enough here: and it is highly necessary that he should have the power; for, if this sort of performance should be carried on in such a manner as to give rise to the immorality which first induced the legislature to interfere, the only remedy will be the refusal of the magistrates at their next licensing-day to renew the licence.

Poland (*Hawkins, Q.C.*, with him), for the respondent. The simple question here is, whether the entertainment, which the respondent has exhibited under the authority and protection of the licence for public music and dancing granted to him by the magistrates pursuant to the provisions of the statute 25 Geo. 2, c. 36, is an infringement of the act for the regulation of theatres, 6 & 7 Vict. c. 68. That, it is submitted, is a question of fact, which has been properly decided by the magistrate in the negative.

[BYLES, J. Does it follow that, because it is an entertainment within the 25 Geo. 2, c. 36, it may not also be within the 6 & 7 Vict. c. 68?]

Undoubtedly not, if it exceed the limit of public dancing as laid down in *Clarke* v. *Searle* (1) and *Guaglieni* v. *Matthews*. (2) It is not every entertainment of the stage that the statute was intended to apply to; but only such as fall within the fair and legitimate definition of stage-plays. This, by the 23rd section, is to be taken to include "every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage," ejusdem generis. Now, the only word here within which this "ballet divertissement" could be suggested to come, is, "pantomime." But a representation is not a pantomime merely because it involves some action and gestures. There may be a written description of a pantomime, so as to come within the protection of the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15: *Lee* v. *Simpson*. (3) But a copy of this entertainment could not be sent to the lord chamberlain under the 12th section of the 6 & 7 Vict. c. 68. *Day* v. *Simpson* (4) is a totally different case. There was there a regular plot, with living actors, both on and off the stage, who spoke. Very different also was the entertain-

(1) 1 Esp. 25. (2) 34 L. J. (M.C.) 116. (3) 3 C. B. 871.
(4) 18 C. B. (N. S.) 680; 34 L. J. (M.C.) 149.

ment which in *Thorne* v. *Colson* (1) was held to be within the 6 & 7 Vict. c. 68. There, a regular story was represented on the stage, with dialogue, and fourteen different characters. In each case it must be a question of degree. This, it is submitted (and so the quarter sessions have already decided) is a mere exhibition of public dancing, accompanied with graceful action; the daggers being a mere accessory.

T. Atkinson, Serjt., in reply, submitted that the entertainment described was clearly an entertainment of a dramatic character, and within the mischief the statute was intended to remedy.

ERLE, C.J. This is a proceeding against the respondent for representing at a place of public entertainment called The Royal Alhambra, in Leicester Square, a stage-play, without a licence from the lord chamberlain. The magistrate refused to convict; but he has stated the facts which were in evidence before him, and has asked the opinion of this Court whether upon those facts he ought to have convicted the respondent, and we are requested in that case to send the matter back to him in order that he may act upon our opinion. After having given the case the best consideration I am able, it appears to me that the question presented to us is one of degree, and is more a question of fact than of law. Subject to the observation that it is difficult to appreciate the scene described without having witnessed it, so far as I am able to understand the statement submitted to us, I incline to the opinion that the decision of the magistrate was the right one. I am utterly unable to define with any satisfactory approach to exactness, at what point public dancing in a place unlicensed by the chamberlain ceases to be lawful and becomes a stage-play or an entertainment of the stage. The earlier statutes which require a licence for the representation of stage-plays profess to give a definition of what shall be deemed a stage-play. In the 10 Geo. 2, c. 28, s. 1, it is provided that it shall include any "interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof." For the exhibition of these there must be a licence from the lord chamberlain. It appears from the cases of *Gallini* v. *Laborie* (2), and *Rex* v. *Handy* (3), before

(1) 3 L. T. (N. S.) 697. (2) 5 T. R. 242. (3) 6 T. R. 286.

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Lord Kenyon, that doubt arose as to what sort of entertainments came within that and the subsequent statute of 25 Geo. 2, c. 36, in which latter statute the legislature seem to have intended to provide for the licensing by the magistrates of places of agreeable entertainment, in the shape of music and dancing, for persons who did not choose to frequent theatres. The respondent has a licence of this latter description. The question raised by this appeal is, whether he has strictly confined himself to music and dancing according to the terms of that licence, or whether that which he has added to the representation does not constitute such an approximation to a dramatic performance as to make the performance a stage-play within the prohibition of the 6 & 7 Vict. c. 68, s. 2. Much has been said by the learned Serjeant about the danger to the interests of morality and decency if an entertainment like this be held to be removed from the control of the lord chamberlain. But I cannot perceive that these are at all endangered by the performance here described. The simple question for us to determine is, whether a cheap entertainment of this sort should be allowed to be given in a place licensed by the magistrates, or is to be confined for the future to theatres licensed by and under the control of the lord chamberlain. Those who contend for the latter proposition ought to shew something in the shape of a necessity for such a construction of the acts of parliament. Dancing and music in public are lawful without the chamberlain's licence: the performance of stage-plays is not. The matter for the magistrate's determination was, whether the entertainment so minutely described in the case comes within the definition given of a stage-play. A great number of females, it seems, dressed in theatrical costume, descend upon a stage and perform a sort of warlike dance: then comes a danseuse of a superior order, who performs a pas seul. If this had been all, nobody could have called the performance a stage-play. But the magistrate adds that the entrance of the première danseuse was preceded by something approaching to pantomimic action. The thing so described certainly approaches very nearly to a dramatic performance: and it is extremely difficult to determine where the line is to be drawn. The magistrate uses two terms of art, viz., "ballet d'action," and "ballet divertissement." The former, it is

said, has a story: the latter has none. I rather incline to think that the line is to be drawn between the two. The "ballet divertissement" involves no consecutive train of ideas, but consists merely of poses and evolutions by a number of persons elegant in shape and graceful in action. On the other hand, the "ballet d'action" has a regular dramatic story which may give rise to all manner of emotions incident to tragedy, comedy, or farce, accompanied by elegance of form and grace of motion. With the highest possible respect for the learned magistrate, if I were called upon to decide, as matter of law, whether or not that, which he has described as a "ballet divertissement," and as not coming up to his notion of a "ballet d'action," came within the meaning and definition of a stage-play in the statute, I could not come to the conclusion that it was, even if I had gone to see the performance. But, upon the description here given of the entertainment, I am unable to say that the point at which the authority of the music and dancing licence stops has been overstepped.

WILLES, J. I am of the same opinion, as to the result of our judgment. When called upon to decide, without seeing it, whether a representation which is not exactly a drama or a portion of a drama falls within the description of a stage-play given in the act, I find myself unable to determine, upon any statement of it, that the thing described is an entertainment of the stage. On first reading the case, my impression was that this was a stage-play within the statute. But, having heard the reasons given by the Chief Justice, I am disposed to think the conclusion I inclined to arrive at was a mere conclusion of fact. I cannot, therefore, say that the matter should go back to the magistrate with a recommendation to convict the respondent. On reading the 2nd section of the 6 & 7 Vict. c. 68, one cannot help being struck with the justice of the remark of Mr. Russell, in the argument of *Rex* v. *Handy* (1), as to the difference between an entertainment *of* and an entertainment *on* the stage. It must at once be acknowleged that we cannot construe the statute by reference to what has ordinarily been represented on the stage. In our own times, we have seen exhibited on the stage of theatres of the

(1) 6 T. R. 287.

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highest class entertainments having nothing of a dramatic character, such as the wonderful performance of Paganini on the violin, and that of Van Amburgh and his lions. We cannot, therefore, construe this section by ascertaining whether the "ballet divertissement," as here described, was represented ordinarily or occasionally on the stage at the time when the 6 & 7 Vict. c. 68 passed, and then come to the conclusion, that, because it was, therefore it is an entertainment of the stage within the meaning of the interpretation clause, s. 23. Those words must be construed to mean entertainments such as those before expressed, viz., tragedy, comedy, farce, &c., which are all of a dramatic character. No doubt, a ballet representing a connected story by acting would properly be called an entertainment of the stage, though not a word was spoken. On the other hand, mere dancing on a stage, without a story, would not. The exhibition of a statue or group represented by the human figure, would properly be called statuesque, not dramatic. On the other hand, one might instance the Tarantula, in which an incident was represented on the stage, with the result exhibited by action, accompanied by music. That I should have thought clearly came within the definition of an entertainment of the stage: it was a connected story. Dealing with the question now before us,—whether one of fact or of law, I do not stop to inquire,—by the light of these illustrations, if I were to state the reasons which incline me to hold this to be a dramatic entertainment, they would be these: that there are persons who may be taken to represent a combat, followed by a triumph; and then the principal performer is introduced, under whose influence a reconciliation is supposed to be effected: this would clearly seem to be dramatic in its character. On the other hand, it might be said that all that took place before the première danseuse appeared on the stage was mere fringe; in which case the character of the performance would not be dramatic. It may well, therefore, be treated as a question of degree whether or not the performance is to be considered as an entertainment of the stage within the 23rd section of the statute.

For these reasons, I own, though with the profoundest deference for the impression of my Lord, if this had been merely a question of fact, I would rather have adopted the opinion expressed by the

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learned magistrate: but, upon the question of law, I feel bound to agree with the Lord Chief Justice.

BYLES, J. I entirely agree with my Lord that this is altogether a question of degree, and that it is difficult to determine the precise point at which to draw the line. I assume that any of the ordinary dances represented in public would not be within the statute. But, where they represent by dumb show the events or actions of human life, they do fall within the statute; and not the less so because the actors perform while they are dancing. Here, the performance represents a descent of a number of females from rocks; an attack, in the course of which some of the combatants fall on the stage, and others stand in triumph over them; and then comes the scene enacted by the principal performer. If I had as matter of fact to decide upon this statement, I should undoubtedly draw the inference that this was an entertainment of the stage, within the statute. The rest of the Court are of opinion that this is a matter of fact, and I do not dissent from that conclusion, though I should have held the same opinion that the magistrate did.

KEATING, J. I agree with my Lord and my two learned Brothers that this is entirely a question of degree, and reduces itself to a question of fact. I agree with my Lord that there is considerable difficulty in drawing the line between dancing in public on the stage and a dramatic representation. But it is not necessary for us on the present occasion accurately to define that line. As, however, the other members of the Court have expressed their opinions, I feel bound to say, that, if I were to pronounce a judgment as to the side of the line on which the facts found by the magistrate bring this case, I should hold that they did bring it within the prohibition of the act. The reasons for that opinion have already been pointed out so clearly by my Brothers Willes and Byles that I need not repeat them. The question being thus reduced to one of fact, we cannot send the case back for a conviction.

Judgment for the respondent, without costs.

Attorney for appellant: *H. T. Roberts.*
Attorney for respondent: *G. Lawrence.*

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXIX VICTORIA.

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Jan. 12.

CATTERALL *v.* HINDLE.

Principal and Agent—Prepayment—Payment in the ordinary course of business.

3 C.P. 122.
4 C.P. 364
5 C.P. 243.

A., a broker, sold some cotton yarn to the defendant. Before its delivery the defendant paid to A. in advance 1000*l.* on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than 1000*l.* the defendant paid the difference to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt:—

Held, that the defendant was still liable to the plaintiff for the price of his yarn, except to the extent of the cash payment: the advance of 1000*l.* to A. not amounting to a prepayment, because it was on the general account; and the settlement of accounts not constituting payment as against the plaintiff: as an agent, whether acting on a *del credere* commission or not, is only authorized to receive payment in cash, in the absence of any practice or custom to the contrary.

Rev'd new trial add 2 C.P. 368

THIS was an action for goods sold and delivered, and on accounts stated. The pleas were, never indebted and payment.

The cause was tried before Montague Smith, J., at Lancaster, at the last summer assizes; when it appeared that the plaintiff was a cotton-spinner, and had been in the habit for some time previous to February, 1865, of employing Joshua Armitage

as his agent, on a *del credere* commission, to sell yarn for him. The defendant was a cotton manufacturer, and, on the 8th of October, 1864, Armitage sold to him 7000 lbs. of the plaintiff's yarn, and on the 12th of October delivered to him 1814 lbs., which were paid for on delivery. On the 14th of October, Armitage, being desirous of raising some money, applied to the defendant for the loan of 1000*l.* The defendant refused, but agreed to purchase of him some yarn of the manufacture of one Kershaw, which he had for sale, and then advanced to him 1000*l.* On the 19th and 20th of October, Armitage delivered to the defendant Kershaw's yarn, which did not amount in value to 1000*l.* On the 24th of December and the 5th of January Armitage made further deliveries to the defendant of the plaintiff's yarn, in performance of his contract. On the 11th of January the defendant settled his account with Armitage, paying him in cash the sum due to him after deducting the 1000*l.* and allowances for discount, short weight, and interest. Armitage subsequently made other deliveries of the plaintiff's yarn to the defendant, which in each case were paid for in cash on delivery. Armitage did not pay over the value of any of the goods to the plaintiff, and became bankrupt; and the present action was brought to recover such part of the price of the yarn delivered on the 24th of December and the 5th of January as was not paid for by the defendant in cash.

The jury found that the defendant advanced the 1000*l.* to Armitage on his general account, and not specially for Kershaw's yarns; and a verdict was entered for the defendant, with leave to move to enter the verdict for the plaintiff for 274*l.* 7*s.*, or such sum as the Court should direct.

Edward James, Q.C., having obtained a rule, pursuant to the leave reserved,

Temple, Q.C., and *John Edwards*, shewed cause. The advance of 1000*l.* amounted, at the least, to a prepayment, which is good as against the principal, *Fish* v. *Kempton*. (1) The plaintiff's goods were, in fact, in course of delivery when the advance was made.

[WILLES, J. When do you say that the 1000*l.* became payment for these goods of the plaintiff?]

(1) 7 C. B. 687; 18 L. J. (C. P.) 206.

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The moment they were delivered. Even if this was not the case, there was a distinct act of appropriation when the settlement was made, *Favenc* v. *Bennett.* (1) It could not have been necessary for the defendant to pay over the money to Armitage for the sole purpose of receiving it back again.

Kemplay (*Edward James, Q.C.*, with him), in support of the rule. The advance of the 1000*l.* clearly was not a payment as against the plaintiff. If he had failed to deliver any more of the yarn, he could not have been sued for money had and received. There was nothing due to the plaintiff at the time the 1000*l.* was advanced, and a payment before delivery was not a payment in the ordinary course of business, and therefore not a payment as against the plaintiff: *Bartlett* v. *Pentland* (2); *Underwood* v. *Nicholls.* (3) In *Favenc* v. *Bennett* (1), the payment was made after the debt was due. The fact that interest was charged shews that it was treated as an advance. Neither did the settlement of accounts with Armitage make it payment. The payment must be by money, and not by a settlement of cross accounts: *Stewart* v. *Aberdein.* (4)

Cur. adv. vult.

Jan. 12. The judgment of the Court (Erle, C.J., Willes, Byles, and Keating, JJ.), was delivered by

KEATING, J. This was an action brought to recover the sum of 274*l.* 7*s.* for goods sold and delivered. The pleas were, never indebted and payment. The facts appeared to be that the plaintiff, who traded under the name of "Paul Catterall, Son, & Co.," was a cotton spinner at Preston, and employed one Joshua Armitage, a commission agent at Blackburn, to sell yarns on his account upon a *del credere* commission as broker. The defendant, a manufacturer at Blackburn, trading under the name of "Edward Briggs & Co.," dealt with Armitage in purchasing from him as agent for the plaintiff and others, yarns marked with the initials of the parties spinning them. Previous to the 14th of October, 1864, he had purchased from Armitage yarns of the plaintiff's, and paid for them in cash, and there was no evidence of any other mode of

(1) 11 East. 36.
(2) 10 B. & C. 760.
(3) 17 C. B. 239; 25 L. J. (C. P.) 79.
(4) 4 M. & W. 211.

payment as between him and Armitage before that date; on that day, the accounts between them being then balanced, Armitage applied to the defendant for a loan of 1000*l.*, which the defendant refused, but agreed to advance that amount for the purchase at an agreed price of yarns to be subsequently delivered. The defendant accordingly paid Armitage on that day 1000*l.*; and on the 19th and 21st of October deliveries of yarns of one Kershaw, to the amount of 725*l.* 13*s.*, were made by Armitage on account of the advance. On the 24th of December and the 5th of January following he delivered yarns of the plaintiff's to the value of 521*l.* 14*s.* 6*d.*, and on the 11th of January a settlement took place by the defendant paying to Armitage the excess beyond the 1000*l.* in cash, and so balancing the account between them to that date. The plaintiff, however, was not paid for those yarns by Armitage, who soon afterwards became bankrupt. In taking the account the defendant debited Armitage not only with the 1000*l.*, but also with interest for delay in the deliveries, as well as discount, short weights, &c. He put to his credit the yarns as delivered, without specifying the makers; but he knew which were the yarns of the plaintiff, and that Armitage, sold them as agent. The jury found that the 1000*l.* was advanced to Armitage upon a general account, and not for Kershaw's yarns specifically, that being the only question the parties desired to be so left. The verdict was entered for the defendant on the plea of payment, leave being reserved to the plaintiff to move to enter a verdict for him for the amount he claimed—viz., 274*l.* 7*s.*, or for such other sum as the Court might think fit, if the transaction between the defendant and Armitage did not prove payment to the plaintiff. A rule having been granted, cause was shewn last term, and after hearing the argument and considering the case, we think the rule should be made absolute to enter the verdict for 274*l.* 7*s.*

That a broker or agent employed to sell has *primâ facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established, and it seems equally clear that, if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the

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agreement, though it may have been agreed to by the agent: see the judgment of Abbot, C.J., *Russell* v. *Bangley* (1); *Todd* v. *Reid* (2); the authority of which, upon this point, is not affected by the correction as to a fact by Parke, B., in *Stewart* v. *Aberdein.* (3) It has also been held by this Court in the case of *Underwood* v. *Nicholls* (4), that the return to the agent of his cheque, cashed for him by the debtor a few days before, was not part payment as against the principal. "It amounts to no more," said Jervis, C.J., "than the debtor seeking to discharge his debt to the principal by writing off a debt due to him from the agent, which he has no right to do." We think the present case the same in principle with *Underwood* v. *Nicholls.* (4) When the plaintiff supplied his goods on the 24th of December and 5th of January, Armitage had, from the 21st of the preceding October, been in debt to the defendant to the amount of 274*l.* 7*s.*, being the difference between the amount for Kershaw's yarns, and the 1000*l.* advanced, and the defendant so treated it in his own account. Now the only way in which the goods so supplied were ever paid for was by writing off that amount from the 1000*l.*, and paying the balance in money, which is precisely what was decided in *Underwood* v. *Nicholls* (4) not to be a good payment as against the plaintiff; and it is to be observed, it did not appear that there was any usage or course of business that would at all make it so; on the contrary, the evidence shewed that all the payments, for goods delivered before and after the transaction in question, were payments in money in the ordinary way, and that the advance of the 1000*l.* was an isolated and exceptional transaction; neither was there any proof whatever of any ratification by the plaintiff, who at once repudiated any authority to Armitage to receive payments for his yarns, except in money.

It was argued by the counsel for the defendant that the advance of 1000*l.* might operate as a prepayment, and that such would be good, and for this he cited the dictum of Wilde, C. J., in the case of *Fish* v. *Kempton.* (5) The case itself only decided that a set-off by the debtor of a debt due to him by a known factor would not

(1) 4 B. & A. 398.
(2) 4 B. & A. 210.
(3) 4 M. & W. 224.
(4) 17 C. B. 239; 25 L.J. (C. P.) 79.
(5) 7 C. B. 687; 18 L. J. (C. P.) 206.

be good as against the principal, but the dictum of Wilde, C.J., was referred to as distinguishing between set-off and prepayment, and suggesting that the latter would have been good.

It is unnecessary, however, to say more in the present case than that the dictum of the Chief Justice applied to the case of a payment to the factor as part of the particular transaction, and which the principal could treat at the time as being made to his agent for him, whereas, in the present case, the payment was not made on account of the plaintiff's yarns, so as that the plaintiff could have called upon Armitage to account for the money, 1000*l.*, or any part of it as received to his use. Had he done so, the answer of Armitage would have been that, although a prepayment in which the plaintiff had a possible interest, yet, inasmuch as the whole might have been exhausted in payment of Kershaw's or other yarns of the agreed quality, the plaintiff would have no right to treat it as a payment to or for him until a subsequent act of appropriation, which in substance is nothing more than writing-off a debt, should take place. It is unnecessary, therefore, to express any opinion upon that dictum as to the law or usage as applied to factors, as we do not think it applies to the present case.

It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent, selling upon a *del credere* commission, receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent, as to receiving payments on account of his principal.

The rule, therefore, to enter a verdict for the plaintiff for 274*l.* 7*s.* will be absolute.

Rule absolute.

Attorneys for plaintiff: *Gregory & Rowcliffes.*

Attorney for defendant: *John Bond.*

1866
Jan. 18.

THOMAS *v.* WELCH.

Patent—Sewing Machines—Provisional and Complete Specification—Claiming Clauses—Effect of the words "as herein described."

Any part of the provisional specification of a patent may be omitted in the complete specification, if there is no fraud, and the effect of the remainder is not altered by the omission.

All the claiming clauses may be struck out of the specification of a patent by a disclaimer, if there remain in the body of the specification words sufficiently distinguishing what the invention is which the patentee claims.

An alteration, verbal merely and not substantive, by means of a disclaimer will not make a patent void.

A specification to which drawings were attached after describing an instrument marked "g," continued "It is the arranging an instrument 'g' as herein described, which, while it is the means of holding the fabric, ... is also the means by which the step-by-step movement is given to the fabric, which constitutes the peculiarity of my invention":—

Held, that this was not a claim of all instruments which were at once the means of holding and moving the fabric; nor on the other hand of the exact machine with all its arrangements contained in the drawings; but a claim to the exclusive right to use "g," or any similar instrument, for the purpose of holding and moving the fabric at the same time.

THIS was an action for the alleged infringement of letters-patent granted to the plaintiff on the 27th of April, 1853, for "Improvements in apparatus for stitching and sewing," as the same were described in the specification amended by disclaimer and memorandum of alteration thereinafter mentioned.

The declaration alleged the grant of the letters-patent, the performance of the conditions by the grantee, that, after the passing of the 5 & 6 Wm. 4, c. 83, and of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), the defendant filed a disclaimer and memorandum of alteration, and that the defendants, during the term, and after the filing of the disclaimer, infringed the plaintiff's patent; and the plaintiff claimed an injunction and account.

The particulars of the breaches filed with the declaration were as follows:—

"That the defendants, at divers times between the 3rd of August, 1861, and the commencement of this action, made and used, or made or used, or caused to be made and used, sewing-

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machines in which the instrument which is the means of holding the fabric or material during the insertion or withdrawal of the needle is also the means by which the step-by-step movement is given to the fabric or material for the succession of stitches as described in and claimed by the amended specification of the plaintiff's letters-patent in the declaration mentioned."

Pleas: 1. Not guilty; 2. Leave and licence; 3. That the plaintiff was not the true and first inventor; 4. That the invention was not a new manufacture; 5. That the invention was not a manufacture for which letters-patent could be granted; 6. Traverse of the grant of letters-patent; 7. That no specification was enrolled; 8. That a disclaimer and memorandum of alteration was not duly entered and filed; 9. That the disclaimer and memorandum of alteration extends the exclusive right granted by the letters-patent; 10. That the invention described in the specification as altered by the disclaimer and memorandum of alteration was another and a different invention from that for which the patent was granted. Issue thereon.

The cause was tried before Erle, C.J., at the sittings in Middlesex, after last Trinity Term, when it appeared that the plaintiff was the patentee of improvements in apparatus for sewing and stitching.

The provisional specification, left at the office of the Commissioners of Patents on the 27th of April, 1853, stated "The improvements consist, first, in moving the work after each stitch by an instrument acting on that surface of the fabric which the needle enters, to facilitate which movement the face of the instrument which acts upon the fabric is serrated or roughened. This instrument, also, or another acting therewith, acts to hold the work during the insertion of the needle, and again during its withdrawal.

"Secondly, in withdrawing the holding means from the fabric, whilst the needle is therein, to admit of any shifting thereof, and to facilitate the varying the direction of the next stitch."

The provisional specification contained a description of other supposed improvements, which were also contained in the complete specification, but were subsequently disclaimed, and on which no question arose.

The complete specification, filed on the 27th of October, 1853, con-

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tained drawings of the sewing machine and its different parts, and after describing several parts, the right to the invention of which the plaintiff subsequently disclaimed, and on which therefore no question arose, proceeded as follows:—

"'g' is the instrument by which the work is held correctly in position during the insertion of the needle, 'c'; and when that insertion has taken place, and whilst the needle, 'c,' is in the fabric, the instrument, 'g,' rises off the fabric being sewn, and moves towards the needle a distance equal to that required to be traversed for the formation of the next stitch, and again holds by pressing on the fabric; the needle, 'c,' then rises through the fabric (the thread therefrom having been interlooped by the shuttle thread), and the instrument, 'g,' still pressing on the fabric being sewn, is caused to slide on the table, 'a,' taking with it the fabric being sewn a distance equal to the length of the stitch required; and whilst that instrument, 'g,' still holds the work, the needle, 'c,' again enters the fabric. The underside of the instrument, 'g,' is roughened to facilitate its sliding with it the fabric or material being sewn."

After proceeding to describe "the manner in which the movements to the instrument 'g' are effected;" the specification continued.

"Sometimes I form the instrument 'g' in two or more parts, as shewn by fig. 5, where the part 'g^{11}' is capable of sliding on the parts 'g, g^1,' the part 'g^{11}' being constantly borne downwards by the spring 'g^{12}.' *The object of thus forming the holding means in two or more parts is to compensate for any inequalities in the material being sewn; and* it is the arranging an instrument 'g' (*a*), which, whilst it is the means of holding the fabric or material during the insertion and withdrawal of the needle, is also the means by which the step-by-step movement is given to the fabric or material for the succession of stitches, *by which I am enabled to obtain great facility in turning to any desired pattern the fabric being sewn,* which constitutes *another* (*b*) peculiarity of my invention. I would however state that although I prefer the arrangement of combined moving and holding means as described in respect to figs. 1, 2, 3, 4, and 5, I do not confine myself thereto, and I sometimes form the combined holding and moving instrument as shewn by the detached

views, fig. 6." In the form of 'g' then described, which was that of a roller, the instrument was not removed from the fabric during any part of the process.

The specification concluded as follows:—

"Having thus described the nature of the said invention, and the manner of carrying the same into effect, I would have it understood that I do not confine myself to the precise details shewn, so long as the peculiar character of *any part of* the invention be retained. *But what I do claim is*—

"*First. The means described for regulating the distance traversed by the needle* 'c.'

"*Secondly. I claim the application of spring* 'f' *in the shuttle race as described.*

"*Thirdly. I claim the so arranging and working the means for holding the fabric whilst the insertion of the needle is effected, that the same may also effect the requisite traverse of the fabric for the successive stitches as described.*

"*Fourthly. I claim the application to shuttles used in sewing or stitching machines of a wire* "1," *as described.*

"*And, fifthly, I claim the general combination of parts shewn and described, by which the working levers act direct between the cams and the working instruments or their carriers, and in straight lines, or nearly so.*"

The plaintiff subsequently, on the 3rd of August, 1861, filed a disclaimer which struck out all the parts of the above which are in italics, and inserted before the commencement of the description of the instrument "g" the words, "but to none of the above-mentioned parts, or to their combinations do I make any claim." It also inserted at (*a*) the words "as herein described," and at (*b*) the word "the."

The defendant had made and sold sewing machines containing an instrument in substance, though not identically, the same as the instrument "g," described in the plaintiff's specification. Previous to the plaintiff's patent, sewing machines had been used in which the same means were employed for holding and moving the fabric to be sewn; but the means adopted for that purpose were substantially different from those described in the plaintiff's specification.

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A verdict was entered for the plaintiff, the damages to be assessed by an arbitrator if necessary; but leave was given to the defendant to move to enter a verdict for the defendant on any of the following grounds:—

1. That there was no evidence of infringement. 2. That the alleged invention was not new. 3. That the complete specification, if its essential feature is that the holder and feeder should be one, is a departure from the provisional specification, which contemplates that there should, or may be, a feeder separate from the holder. 4. That the complete specification nowhere describes the removal, at successive intervals, of the presser from the fabric sewn, as of the essence of the invention. 5. That the complete specification contemplates, as within the invention, an arrangement in which the holder and feeder is never removed from the fabric sewn. 6. That the disclaimer, at p. 3, line 27, disclaims or erases the words referring to the advantage derived from the facility of turning the fabric down. 7. That, all the claims in the specification being struck out by the disclaimer, no claim can now be made as to anything included in, or covered by any of them. 8. That the third claim in the specification, before disclaimer, claimed the arranging and working means for holding the fabric while the insertion of the needle is effected; that the specification, after disclaimer, states that the peculiarity of the invention is the arranging an instrument "g," which is the means of holding the fabric during the insertion and withdrawal of the needle; and that this is a wider, or at all events, a different, claim. 9. That no reference in any part of the original claim is made to the step-by-step movement, and, if this is claimed under the amended specification, the claim is wider and different than before disclaimer. 10. That there is no claim in the specification in respect of a feed from above, but the words would include equally a feed from below, or underneath the fabric sewn. 11. That the specification is vague, uncertain and ambiguous, and does not distinguish between what is new, and what is an improvement, and what is old, and the invention is described and claimed in terms large enough to cover what is old. 12. That, in particular, the description of, and the claim in respect of the invention in the specification, would include an arrangement similar to that in *Judkins*, and

Hughes, No. 1 machines, or in any four-motion feed in use before the plaintiff's patent. 13. That the third claim in the specification, would include and claim an arrangement, such as *Morey's*, of 1849, and that the specification, since disclaimer, either still claims such an arrangement, or else makes a claim different from the specification before disclaimer. 14. That the description of the invention, after disclaimer, being limited by drawings and description, and not being as it was before—a general claim—substitutes an invention different from that originally claimed. 15. That if the claim in the amended specification is for the arrangement of an instrument "g," as therein described, the machines of the defendant's complained of, contained a different arrangement of the instrument "g." 16. That, upon the evidence (including the several machines produced and shewn to the jury), the defendants are entitled to have the verdict entered for them upon several of the issues.

The Court were to be allowed to draw inferences of fact.

Sir H. Cairns, Q.C., moved for a rule *nisi*, pursuant to the leave reserved, and argued, 1st. That if the gist of the invention, claimed by the complete specification, was that it had the feeder and holder in one, it was a different invention from that claimed in the provisional specification, which says: "The improvements consist in an instrument acting on the surface of the fabric which the needle enters. . . . . This instrument, or *another acting therewith*, acts to hold the work during the insertion of the needle, and again during its withdrawal;" the alternative being then given of a second instrument, it is clear that the invention claimed was not the using one only. 2nd. That the invention, as stated by the plaintiff's counsel, was for a means of freeing the fabric being sewn by the rising of the instrument "g" during the intervals between the stitches; and the complete specification, giving the alternative of a roller which did not release the fabric at all, did not sufficiently describe such an invention. 3rd. That, even if the patentee could strike out all the claiming clauses without destroying the patent, which was doubtful, he at least was bound to specify distinctly what constituted the new invention which he claimed. That the clause "it is arranging an instrument 'g,' as herein described,

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which, whilst it is the means of holding the fabric . . . . is also the means by which the step-by-step movement is given to the fabric . . . . which constitutes the peculiarity of my invention," is insufficient, because, if the words "as herein described" merely make the drawings examples and illustrations of the invention, it would amount to a claim of all machines in which there was an instrument that at once held and moved the fabric, of which there had been many previous to the defendant's patent; while, if the drawings be considered as incorporated as part of the description of the invention, as in *Foxwell* v. *Bostock* (1), it does not sufficiently distinguish what part of the arrangement or instrument is claimed as new; much of the arrangement and means of moving "g" being old. 4th. That, on the latter interpretation only, the use of an instrument identical with "g" would be an infringement of the patent, and that the form of instrument adopted by the defendant, differed in some respects from the drawings in the specification. 5th. That the claim in the complete specification, before disclaimer, was for a means of holding the fabric during the insertion of the needle; but, after the disclaimer, for a means of holding the fabric during the insertion and withdrawal of the needle, a different, and therefore, a void claim: *Ralston* v. *Smith*. (2)

Rule nisi.

Grove, Q.C., Bovill, Q.C., Hindmarch, Q.C., Webster, Q.C., Aston, and *T. Salter,* shewed cause. One form of the instrument "g" described in the complete specification is made in two parts, and this would sufficiently account for the words in the provisional specification, "or another acting therewith." It is not necessary, however, that the complete specification should contain all that is mentioned in the provisional specification, the very object of this latter being to enable the inventor to continue his experiments openly, and so perfect his invention; and if any part turns out to be useless he need not include it in the complete specification. He does not, by including any invention in his provisional specification, exclude any one from its use, for his patent rights do not commence till after the complete specification, *Oxley* v. *Holden*. (3)

(1) 12 W. R. 723; 10 L. T. (N. S.) 144.

(2) 11 C. B. (N. S.) 471; 31 L. J. (C. P.) 102.

(3) 8 C. B. (N. S.) 666; 30 L. J. (C. P.) 60

The object of the provisional specification is to prevent persons applying for a patent in general terms, and then bringing out under it some invention they had not thought of at the time they applied for it: *Crossley* v. *Beverley*. (2) The only case on the effect of a difference between the provisional and complete specification is *Newall* v. *Elliot* (3); there the complete specification contained an addition to what was mentioned in the provisional specification, which was made the subject of a separate claim, and yet the patent was held good. The loosing of the fabric between the stitches was only one of the advantages of the invention, and was rightly disclaimed, as it was not applicable to all the forms of the instrument. The gist of the invention was the having an instrument which performed at the same time the office of feeder and holder. In no previous machine had this been done at all in the same way or sense as that in which it was done by the instrument "g."

The striking out of all the claiming clauses was perfectly justifiable. A specification need not contain a claim at all; it is sufficient if it contain a description of the invention and the mode of carrying it out. In this case, however, only the *claiming clauses* are struck out, and there remains a distinct *claim* in the body of the specification, v:—"It is arranging an instrument 'g' as herein described . . . . which constitutes the peculiarity of my invention;" and this clearly points out what it is that the plaintiff claims as new. Nor does the striking out of the claiming clauses at all alter the invention; the distinction between the expressions "during the insertion of the needle" and "during the insertion and withdrawal of the needle" is a merely verbal one; and the words "as described" in the third claiming clause sufficiently referred to the drawings before the disclaimer to limit the patent by them, *Barber* v. *Grace*. (4) The case of *Ralston* v. *Smith* (5) was widely different. There the invention patented was useless, except in one particular case, to which the plaintiff sought to limit it by his disclaimer. But he did not discover till after the patent had been granted its

~~(1) 8 C. B. (N.S.) 666; 30 L. J. (C. P.) 68.~~

(2) 3 C. & P. 513; 1 Webster, 106.

(3) 4 C. B. (N. S.) 269; 27 L. J. (C. P.) 337.

(4) 1 Ex. 339; 17 L. J. (Ex.) 122.

(5) 11 C. B. (N. S.) 471; 31 L. J. (C.P.) 102.

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peculiar applicability to that particular case. The Court treated it, therefore, as a variation of the patent. After the disclaimer the invention is equally limited by the words "as herein described." The machine used by the defendant was a direct infringement of the plaintiff's patent, because, though not identical with either of the drawings, it was within the terms of the specification.

Manisty, Q.C., Mellish, Q.C., and *Macrory*, in support of the rule. There are two possible constructions that may be put on the specification. In the first place it may be that the specification, since the disclaimer, claims all instruments which at once hold and move the fabric. Three forms of the instrument "g" are given, and the invention therefore must be something common to all of them; it must also be something that is distinctly mentioned and claimed. The only thing of which both these things are true is the principle of holding and moving the fabric by the same instrument. The specification, too, speaks of the "arranging *an* instrument 'g,' not *the* instrument, as being the peculiarity of the invention; and the expressions, "I would, however, state that although I prefer the arrangement of combined moving and holding means as described in respect to figs. 1, 2, 3, 4, and 5, I do not confine myself thereto;" and "I do not confine myself to the precise details shewn, so long as the peculiar character of the invention be retained," shew that that peculiar character must be the combination of the moving and holding instruments in one, and that it cannot be confined to the particular ways of doing this shewn in the drawings. If this be the true construction of the specification the invention is not novel. The way to test this is to see if machines in use before the plaintiff's patent would have been infringements of that patent if they had been first used after it; and it is clear that, if the above be the true construction, several earlier forms of sewing machines would have been so. Secondly, it may be held that the words "as herein described" make the drawings part of the description of the invention, as in *Foxwell* v. *Bostock*. (1) The specification states that "the arranging an instrument 'g,'" and not the instrument "g" itself, is the peculiarity of the plaintiff's invention. In this view the specification claims the whole manner of arranging and moving "g," much of which is admitted not to be new. These are the most

(1) 12 W. R. 723; 10 L. T. (N.S.) 144.

important objections to the patent, but there are many others which were mentioned in moving for this rule. The complete specification differs from the provisional one. The provisional specification speaks of two instruments, the complete specification only describes one. In the provisional specification the main characteristic of the invention is that the fabric is released between the stitches; this is not a characteristic at all of the instrument as described in the complete specification.

ERLE, C.J. I am of opinion that this rule should be discharged. It is said in the first place that the complete specification is void because it omits some of the inventions put forward in the provisional specification. The provisional specification describes an instrument, and then says that "this, or another acting therewith, acts to hold the work during the insertion of the needle." It is said that the complete specification contains nothing corresponding to this second alternative. Assuming that this is so, I do not think that the objection ought to prevail. The difference is a slight one, and injured nobody; and it may be that the patentee had something in his mind when he filed his provisional specification, which he found afterwards would be useless. If such had been the case after the filing of the complete specification he could have filed a disclaimer; but, as he could not disclaim formally part of the provisional specification, he might, I think, in such a case as the present, have omitted it from his complete specification. It may be, however, that one form of "g" mentioned in the complete specification, which is in two parts, is what was referred to in the expression "and another acting therewith." The real questions, however, are whether the patent is void for want of novelty, and whether there was any infringement, both which depend on the construction of the specification. In dealing with such inventions, I consider what was the mechanical contrivance in the patentee's mind, and what was the object he sought to gain thereby; and, if the same object has previously been carried out by the same or similar means, the patent is void. It is necessary that the specification should state the object, and the means by which the patentee proposes to effect it; this is often done in the form of a claim, but here all the claiming clauses have been struck out by

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the disclaimer. In the middle of the specification, however, he has declared what is the peculiarity of his invention; and it is the "arranging an instrument 'g' as herein described, which, whilst it is the means of holding the fabric, also moves it." The object of the invention is to shew how the fabric can be at the same time held and moved, and it is always by means of "g." The letter "g" stands for three instruments, but it is the mode in which "g" is used, both to hold and to move the fabric, which constitutes the peculiarity of the invention. I quite agree that it must be something which is common to all three forms of "g" which constitutes the peculiarity of the invention, and that it is the fact of the means of holding the fabric being also the means by which the step-by-step movement is given to it. Does the patentee then claim all instruments which at once move and hold the fabric? I think not. It is arranging an instrument "as herein described," which he claims. Comparing that instrument with those in use before, I find that it differs in several points, and I think that there is considerable evidence that it was a really valuable improvement. If we take then the invention to be the holding and moving the fabric at the same time, as therein described, by an instrument similar to "g," I think it is clear that the defendant has infringed it, since his machines contain an instrument similar to "g," producing substantially the same effects. I think, therefore, that the plaintiff is entitled to keep his verdict.

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WILLES, J. I am of the same opinion. I consider that the question of the difference between the provisional and complete specification is settled by authority. The difference is not alleged to have been dishonest, and I do not think that the legislature intended that the provisional specification should only prove an additional pitfall. I am not at all satisfied, moreover, that there is not a second instrument mentioned in the complete specification. I do not think that the disclaimer enlarged the specification, for insertion includes both the going in and coming out of the needle, the needle continuing inserted till it is actually out of the fabric. Then, as to the words "as herein described," they are properly inserted, for they were in the third claiming clause, and, that being struck out, their insertion in the middle only makes the specification the same as before: and I think their effect is, as has

been so ably expressed by my Lord Chief Justice, to limit the invention claimed to the holding and moving the fabric at once in the way described in the drawings; and I think there is no evidence that that had been previously done. It is stated that the third form of "g" is identical with one of the forms of machine mentioned in Hughes's patent, but I am not satisfied either that they are the same, or that the description in Hughes's patent, is sufficiently distinct to enable an ordinary mechanic to make the instrument from it; which *Arkwright's Case* (1) shews that it ought to be. Lastly, I think that the defendant has infringed the patent, for he has used the same instrument "g" for the same purpose, though he has set it in motion in a slightly different way.

KEATING, J. I am of the same opinion. The great question is whether the defendant's construction is right, according to which the plaintiff claims the principle of holding and moving the fabric at once, and not the means of carrying it out. I think that the clause is sufficiently confined to the carrying out the principle by means of an instrument similar to "g."

MONTAGUE SMITH, J. I am of the same opinion. The question is whether the plaintiff's claim is too wide. I think it is sufficiently confined to the instrument for both holding and moving the fabric which is described, used in the way described, and to other similar instruments, used in a similar way. The whole scheme of the specification as altered by the disclaimer seems consistent with this: he disavows all claim to the parts of the machine first described, and then proceeds at once to the description of the instrument "g." The words "as herein described" are put after the words "the instrument 'g,'" and not after the word "arranging;" and then there is a subsequent description of another similar instrument. If this be the true construction, I think the patent had not been anticipated. I agree on all the other points with the judgments and reasons of my learned Brothers.

Rule discharged.

Attorneys for plaintiff: *Wilson, Bristows, & Carpmael.*
Attorneys for defendant: *Johnson & Weatheralls.*

(1) Davies Pat. Cas. 106.

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PHILLIPS AND OTHERS *v.* POLAND.

Debtor and Creditor—Bankruptcy—Protection Order—12 & 13 Vict. c. 106. s. 112.

The word "creditor" in the Bankruptcy Acts, includes only creditors who are such at the date of the bankruptcy, and who have a right to come in under it to prove their debts; and a protection order under the Bankruptcy Act, 1849, (12 & 13 Vict. c. 106), s. 112, is only available against such creditors.

THIS was an application to discharge the defendant out of custody. The defendant was in March, 1864, adjudicated bankrupt on his own petition, and obtained a protection order pursuant to the provisions of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 112. This order was subsequently renewed from time to time till the 29th of January, 1866.

The plaintiffs having brought this action for the price of goods supplied to the defendant during the months of August and September, 1865, obtained judgment, and issued a writ of *ca. sa.*

The defendant was arrested on the 16th of December, 1865, at his lodgings; he was not engaged at the time in any duties connected with his bankruptcy; but he had not passed his final examination. An application having been made to Byles, J., at chambers for his release, on the ground that the protection order protected him from all arrest, the matter was referred to the Court.

Nasmyth having accordingly obtained a rule calling on the plaintiffs and the sheriff to shew cause why the defendant should not be discharged out of custody.

Henry Bullar shewed cause for the plaintiffs. There are three bankruptcy acts at present either wholly or partly in force, viz., those of 1849, 1854, and 1861. The act of 1854 was an addition to the act of 1849, and contained a provision that the two should be construed as one act. The act of 1861 repealed, amongst others, the interpretation clause of the act of 1849, and enacted a new one; it provided that the three acts should be construed as one, and must be treated as the commencement of a new system of legislation on this subject. The cases on the earlier bankruptcy acts are therefore irrelevant.

In the present case, the protection order was granted under the provisions of the Bankruptcy Act, 1849, s. 112, and the question is, whether the plaintiff was a creditor within the meaning of that section. (1) Throughout the bankruptcy acts the term "creditors" applies only to creditors who were so at the time of the bankruptcy, and who were entitled to prove under it. In the act of 1861, the first place in which the word "creditors" occurs is section 116, and it there refers only to creditors who were such at the time of the bankruptcy. In section 142 "all creditors," and in section 144 "every creditor," must have the same meaning, and so in all the other sections. The word creditor must have the same meaning given to it throughout the act: *Reg.* v. *Poor Law Commissioners, in re Holborn Union.* (2) The Case of *Grace* v. *Bishop* (3), is expressly in point. The cases of *Ockford* v. *Freston* (4), *Bateman* v. *Freston* (5), *Ex parte Freston* (6), relied on by the other side, are beside the question, because they related to debts provable under the bankruptcy, and turned on the validity of an arrest made under the 257th section of the act of 1849, which is now repealed; the judgment of the Lord Chancellor in the last of these must be read in connection with the subject-matter of the case, though it is expressed in general terms.

Quain, for the Sheriff of Middlesex. In *Grace* v. *Bishop* (3), the defendant had passed his final examination; it is not distinguishable from the present case in any other particular, and that does not touch the point raised by the plaintiffs' counsel, and which was decided in that case.

Nasmyth, in support of the rule. The 112th section of the Bankruptcy Act, 1849, is only a re-enactment of 5 Geo. 2, c. 30, s. 5, and the cases on that statute shew that the bankrupt having a

(1) This section provides "that if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the time by this act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after his examination until his certificate be allowed, as the Court shall from time to time, by indorsement upon the surrender of such bankrupt think fit to appoint."

(2) 6 A. & E. 56.

(3) 11 Ex. 424; 25 L. J. (Ex.) 58.

(4) 6 H. & N. 466; 30 L. J. Ex. 89.

(5) 30 L. J. (Q.B.) 133.

(6) 30 L. J. (Ch.) 460.

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protection order is absolutely free from arrest till the final sitting. In *Davis* v. *Trotter* (1), which was an action against a sheriff for an escape, he having released a debtor who had a protection order, Lord Kenyon said that he was quite satisfied that he ought to have nonsuited the plaintiff at the trial. A similar case was *Ex parte Dalton.* (2)

[WILLES, J. You must note two points in each case; first, whether there was any common law privilege from arrest, in the present case there was not, because the defendant was not going to or returning from the court, or engaged on any business connected with it; secondly, whether the debt accrued before or after the bankruptcy.]

In *Darby* v. *Baugham* (3), the bill became due after the bankruptcy, though it appears to have been drawn before it. There is no case that carries it farther, and it is not likely that such a case should occur, as credit is seldom given to a bankrupt. In *Grace* v. *Bishop* (4), the bankrupt had finished his examination, and it was on that ground that the protection order was held insufficient. The right to protection is absolute under the statute during the term allowed by the statute for surrendering, independently of the protection order, *Ex parte Leigh.* (5) On principle, as well as authority, the order must extend to protect him from arrest for any debts; the bankrupt divests himself of all his property, on the faith of protection being granted to him, and there will be no inducement to him to do so, if he is still liable to arrest. The commissioners have the power of committing the bankrupt to prison to enforce his compliance with their demands; but this means of control will be lost if he be in prison at the suit of other parties. Again, it is laid down in the books that the bankrupt is protected from arrest, that he may go about and gather the information relating to his debts and assets which is required by the commissioners; and this is equally a reason for protecting him from arrest for debts incurred after, as before, his bankruptcy.

WILLES, J. This was a rule calling on the plaintiffs, and on

(1) 8 T. R. 475.
(2) 1 Ball & B. 130.
(3) 5 T. R. 209.
(4) 11 Ex. 424; 25 L. J. (Ex.) 58.
(5) 1 G. & J. 264.

the Sheriff of Middlesex, to shew cause why the defendant should not be discharged out of the custody in which he lies under a writ of *ca. sa.* It appears that the judgment was for a debt contracted after he became bankrupt. The defendant insists that he is entitled to be discharged, on the ground that he has a protection order granted under the powers of the Bankruptcy Act, 1849, s. 112. He was, no doubt, arrested during the term that the protection order was in force; he was not, however, going to or coming away from the court of Bankruptcy, nor was he employed on any business which he was bound to attend to for the court. He had not passed his last examination. The question depends, not upon any privilege at common law, but on the construction of the word "creditor" in the 112th section of the Bankruptcy Act, 1849; does it mean any creditor for any debt? or does it mean a creditor who can come in under the bankruptcy, and have the benefit of it? I apprehend that the latter is the true construction. The rule is clear, that general words are to be construed generally, unless there is something in the act which shews that such was not the intention of the legislature. But it is clear, also, that general words are to be restrained to the matter with which the act is dealing; and if it be dealing with some particular species only, the general words must be limited to that species, except where it can be shown to be dealing with something larger. Looking, therefore, merely at the word creditor, we should conclude that it was only intended to apply to such persons as come within the powers of the act, and can share in its benefits, and the more so as the section interferes with the remedies of the persons coming under the designation. The arguments to the contrary are of two kinds; first, the necessity of giving a larger protection, for the purposes of the act; and second, in respect of authority.

As to the first, even if we adopt the more limited construction of the word creditor, the bankrupt will have at common law the same protection as a witness, when going to, or returning from, the court; and moreover, the commissioners have, by the same section (1), power to order the person of any bankrupt in custody to be brought before them, and this whatever the nature of the commitment. In that section the words are very wide, "whenever

(1) 12 & 13 Vict. c. 106, s. 112.

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any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence." If it had been intended that the protection order should protect from all arrest, some similar form of expression would have been used with respect to that.

Secondly, as to authority. *Davis* v. *Trotter* (1), *Ex parte Dalton* (2), *Ex parte Leigh* (3), and *Ex parte Freston* (4), do not touch the present case, because it does not appear in them that the debts accrued due after the bankruptcy. *Darby* v. *Baugham* (5) is relied on as shewing that the analogous section, 5 Geo. 2. c. 30, s. 5, applied equally to debts accruing before or after bankruptcy. That case was peculiar; the person who issued the *ca. sa.* was the acceptor of an accommodation bill of the bankrupt; the bill became due after the bankruptcy, but no doubt it was drawn before it. It was a case, therefore, of a liability incurred before the bankruptcy, and in respect of which the creditor could prove; and in which, since 49 Geo. 3, c. 121, the principal debtor would have been discharged as against the surety. That was not the case then, but I find it stated in Christian's *Bankruptcy Laws*, vol. ii. p. 370, that it had been decided even previous to *Darby* v. *Baugham* (5), that the Lord Chancellor, sitting in bankruptcy, could give relief by compelling the creditor to prove his debt on behalf of the surety. The case, therefore, may not be so much opposed to *Grace* v. *Bishop* (6) as at first sight appears. I think *Grace* v. *Bishop* (6) is quite in point. The only possible distinction is, that in that case the defendant had passed his final examination, but that cannot affect the meaning of the word "creditors." Even, therefore, if *Darby* v. *Baugham* (5) is an authority to the contrary, and cannot be explained in the manner I have suggested, we have an authority in 1793 in favour of the defendant, and an authority in 1855 against him, and we are bound to follow the later authority. I am, therefore, of opinion that the rule should be discharged.

MONTAGUE SMITH, J. I am of the same opinion. No question arises as to the defendant's right at common law to be discharged,

(1) 8 T. R. 475.
(2) 1 Ball & B. 130.
(3) 1 G. & J. 264.
(4) 30 L. J. (Ch.) 460.
(5) 5 T. R. 209.
(6) 11 Ex. 424; 25 L. J. (Ex.) 58.

because when arrested he was not going to surrender or in any way attending on the commissioners, or any officer of the court of Bankruptcy. The right, if it exists, depends on the statute. I think we are fortified by the opinion of the court of Exchequer in the case of *Grace* v. *Bishop* (1), which cannot be distinguished from the present case. I think the case of *Darby* v. *Baugham* (2) may be supported in the way suggested by my Brother Willes. The construction of the Bankruptcy Act, therefore, appears to me, though I am not free from all doubt, to be that which my Brother Willes has said. The term "creditors" seems to have the restricted meaning throughout the act, and there is no ground for applying to it a more extensive sense in section 112. It might be doing great injustice if the act gave freedom of arrest from debts, the circumstances attending which the commissioners in bankruptcy could not investigate, owing to their having accrued due subsequently to the bankruptcy.

Rule discharged.

Attorneys for plaintiffs: *Bothamley & Freeman.*
Attorneys for defendant: *Cuddon & Miles.*
Attorneys for Sheriff of Middlesex: *Burchell & Hall.*

(1) 11 Ex. 424; 25 L. J. (Ex.) 58. (2) 5 T. R. 209.

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Jan. 24.

ABLERT, Appellant; PRITCHARD, Respondent.

Turnpike Acts—(3 *Geo.* 4, *c.* 126; 9 *Geo.* 4, *c.* 77; 14 & 15 *Vict. c.* 38)—*Right to Toll—Thrashing Machines—Repugnance of a later to a former Act.*

The General Turnpike Act (3 Geo. 4. c. 126), s. 4, enacts that all its provisions shall extend to all turnpike acts that shall be thereafter passed, except as to things expressly referred to and varied by such acts: and s. 32, that all implements of husbandry shall be exempt from toll. By 9 Geo. 4, c. 77, s. 19, it is provided that the General Turnpike Act shall extend to every local act as fully as if it were re-enacted in such act. By 14 & 15 Vict. c. 38, s. 4, it is provided that implements of husbandry, when mentioned in the General Turnpike Act, shall include thrashing machines.

By a local act it was provided in the interpretation clause that cart should include thrashing machine; and in a subsequent section, which was the only section in the act to which this interpretation could apply, that a toll of 6*d.* should be payable on every horse drawing a cart:—

Held, that the local act did expressly refer to and vary the provisions of the General Act, and that thrashing machines were liable to toll.

Semble, any provisions in a local act repugnant to those in the General Act would override them, even though not expressly referring to the things and matters in the General Act.

Case stated under 20 & 21 Vict. c. 43, by a justice for the County of Monmouth.

The appellant was collector of tolls at a turnpike gate on the Abergavenny road, and took toll from the respondent who passed through the gate with horses drawing a thrashing machine. The tolls on the Abergavenny road are regulated by the Abergavenny Roads Act (26 Vict. c. lix). By section 2 of that act it is enacted, "that the word 'cart' and the word 'waggon' respectively, shall include all carts, waggons, wains, vans, caravans, drays, timber-carriages, drags, sledges, and other such vehicles, by whatsoever name known, respectively adapted or used for the conveyance of heavy articles, and thrashing machines, and other heavy wheeled vehicles." By section 17, "That it shall be lawful for the trustees to cause to be taken at their several toll-gates tolls not exceeding the sums following, that is to say, amongst others, sums for every horse or other beast drawing any waggon or cart (except only waggons or carts going for, or returning laden with, lime only), 6*d.*" There was no other clause in the act to which the interpretation of "cart" as including thrashing machines could apply. The

appellant contended that, under the above provisions she was entitled to take toll for horses drawing thrashing machines. The respondent contended that the effect of 3 Geo. 4, c. 126, s. 32 and 9 Geo. 4, c. 77, s. 19, was to exempt horses drawing thrashing machines from toll (1). The justice having convicted the appellant, stated this case for the opinion of the Court, whether the horses were liable to toll.

Gray, Q.C., for the appellant. The toll on thrashing machines is "expressly referred to and varied" by the local act, and is therefore a matter or thing as to which the General Turnpike Act is not in force. Secondly, the exemption of thrashing machines

(1) 3 Geo. 4, c. 126, provides s. 4, "And whereas it is of great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom; be it therefore enacted, that from and after the 1st day of January 1823, all the enactments, provisions, matters and things in this act contained, shall extend, and be deemed, construed and taken to extend to all Acts of Parliament now in force, and to all acts which shall hereafter be passed, for making, widening, turning, mending, repairing or maintaining any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters and things as shall be expressly referred to, and varied, altered or repealed by any such act or acts as shall be hereafter passed."

Sec. 32. "That no toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament on any turnpike road, ... for any horse, beast, or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day any dung, soil, compost, or manure (save and except lime), for improving lands, or any ploughs, harrows, or implements of husbandry (unless laden also with some other thing not hereby exempted from toll), or any hay, straw, fodder for cattle, &c."

9 Geo. 4, c. 77, provides, s. 19, "That all the powers, authorities, clauses, penalties, forfeitures, matters and things contained in the acts of the third, fourth, and seventh, and eighth years of the reign of his present Majesty (except such parts thereof as are varied altered, or repealed) . . . . shall extend, and be construed to extend, to every local turnpike act, and shall be applied and put in execution as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of such local turnpike act, and were made part thereof; and the said recited acts shall not be recited in any such local turnpike act, save and except as to such powers, authorities, clauses, provisions, penalties, matters and things as shall be expressly referred to for the purpose of being varied, altered, or repealed by any such local turnpike act."

14 & 15 Vict. c. 38, s. 4, provides, "The words 'implements of husbandry' in the 3 Geo. 4, c. 126, s. 36, shall be deemed to include thrashing machines."

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from toll is not "a matter contained in" the General Turnpike Act, but was enacted subsequently by 14 & 15 Vict. c. 38, which was an enacting and not merely a declaratory act. Thirdly, if by the phrase, express reference, is meant the mention in terms of the General Turnpike Act, the provision is of no effect. No parliament can limit the power of a subsequent parliament, and therefore if the provisions of any subsequent local act are contrary to those of the General Act they will repeal them in spite of the clause saying that they shall continue in force: *Lyn* v. *Wyn.* (1) In *Williams* v. *Pritchard* (2) the later act was a general act, and there was nothing to shew that the legislature intended to repeal the former act as the two could co-exist. An act relating to a particular place or thing may provide that no General Act shall extend to it, and then unless the General Act appears to contemplate the repeal of the privilege, it will not do so, because it will not be meaningless or inconsistent if it does not. Parliament may make rules to regulate its conduct, but cannot bind itself by them; thus if an act were brought in a second time the same session, contrary to rule, and passed, it would be a binding act. Even if the general and local acts are to be treated as one act being in *pari materiâ*, the later section will repeal the earlier one; but in fact it cannot be left out of consideration that the acts were really passed by different parliaments, and we are to seek for the intention of the parliament which passed the later act. If the legislature must be taken to have been reminded of the former statute by the subject under their consideration, it makes it more clear that they intended to repeal it.

Henry James, for the respondent. If the local act stood alone it would no doubt authorize toll to be taken on thrashing machines; the question is whether the 3 Geo. 4, c. 126, and 9 Geo. 4, c. 77, do not exempt them. The 14 & 15 Vict. c. 38 is only declaratory, since a thrashing machine is obviously an implement of husbandry. According to 3 Geo. 4, c. 126, s. 4, it is not enough that the matter be expressly referred to in the later act, it must be varied, altered, or repealed; and there must therefore be a direct reference to the substance of the earlier enactment. By the 9 Geo. 4, c. 77, s. 19,

(1) Bridg. C. P. 122.

(2) 4 T. R. 2; see also *Perchard* v. *Heywood*, 8 T. R. 468.

the General Act is to have the same effect as if it were repeated in the body of the local act. The very object of these statutes was to produce uniformity in the different turnpike trusts; see the recital in section 4 of the General Act, and *Rex* v. *The Trustees of the Northleach and Witney Roads.* (1) If the clauses in the two acts are inconsistent, that in the General Act will prevail. 1st, because the local act does not enjoin, but only permits, that the toll shall be taken, while the General Act prohibits it. 2ndly, The local act gives the tolls only by inference, and the General Act prohibits them expressly. 3rd, It rests with the appellant to prove her right to take tolls, not with the respondent to disprove it. 4th, An exemption, and especially an exemption in favour of husbandry, will be favoured: *Hickinbotham* v. *Perkins.* (2) It is true that the legislature cannot bind any future legislature, but they can provide that an act shall be included in all future acts, and this, though it will not bind the legislature, because they can repeal it, yet till it is repealed will have the intended effect. This is in fact the case with the Lands Clauses Consolidation Act. On the general rule of construction of acts of parliament, see *Middleton* v. *Crofts.* (3)

Gray, Q.C., in reply. If the toll is not payable, the words "thrashing machine" in the interpretation clause of the local act have no meaning. The effect of 9 Geo. 4, c. 77, is only to render it unnecessary to repeat the General Act, if its provisions are intended to apply. In the case of the Lands Clauses Consolidation Act, a clause in the special act has been frequently held to prevail over the General Act, because it has been held to shew the intention of the legislature. The rule is, to decide according to the intention of the legislature if it can be ascertained, and if not, to hold the last act binding: *Reg.* v. *The Inhabitants of St. Edmund's, Salisbury* (4); *Dean of Ely* v. *Bliss.* (5)

ERLE, C.J. I am opinion that our judgment should be for the appellant. The local act provides, in section 17, that it shall be lawful for the trustees to take toll for every horse drawing a cart, and, in the interpretation clause, that "cart" shall include thrash-

(1) 5 B. & Ad. 978.
(2) 3 B. Moo. 185.
(3) Ridg. t. Hardw. 109.
(4) 2 Q.B. 72.
(5) 5 Beav. 574.

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ing machine; therefore it does in express terms authorize the trustees to demand toll for a thrashing machine. I cannot give any effect to the words in the interpretation clause "including thrashing machines," unless I hold that such machines are liable to toll. The difficulty arises from referring to the statutes which exempt implements of husbandry from toll; 3 Geo. 4, c. 126, s. 32, enacts that no toll shall be demanded for any horse employed in conveying any implements of husbandry. That is universal as to all England, and s. 4 enacts that it shall apply to all future acts; and 9 Geo. 4, c. 77, provides that it shall be read as part of such future acts. Coupling these with 14 & 15 Vict. c. 38, we get a direct enactment that thrashing implements shall be exempt from toll; and that these statutes shall prevail except in relation to any matter or thing expressly referred to in the subsequent statute. I think, however, that the local act does specially "refer to the thing" exempted, and makes thrashing machines liable to toll.

WILLES, J. I am of the same opinion. To sustain the decision of the justice, would be to strike from the local act special words, and with them, special matters. The decision really amounts to this, that to repeal the exemption in 3 Geo. 4, c. 126, s. 32, it is necessary that there should be not only an enactment that implements of husbandry shall pay toll, but an express reference to and repeal of the provisions of the former act. If that were the true meaning of 3 Geo. 4, c. 126, s. 4, there might be great difficulty in giving it effect, because the subsequent act would, if repugnant to it, prevail over the whole former act, including the special clause in it. 3 Geo. 4, c. 126, s. 4, however, only provides that the thing to which that act is not to apply must be expressly referred to; and the liability of articles of husbandry is expressly referred to in this local act, for the effect of the interpretation clause is, that you may in the enacting clause read the interpretation of the word instead of the word itself. I think it is clear that not only express words, but any repugnancy would be sufficient to repeal the former act.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the appellant.

Attorneys for appellant: *Raw & Gurney.*

Attorneys for respondent: *Raw & Gurney.*

HUMPHREY, APPELLANT; BETHEL, RESPONDENT. 1866 Jan. 26.

Volunteer Act, 1863 (26 & 27 *Vict. c.* 65), *s.* 45—*Yeomanry Officer—Highway—Exemption from toll.*

A yeomanry officer is not a volunteer within the meaning of the Volunteer Act, 1863, and is not exempt from toll when *driving*, in uniform, to the place appointed for exercise.

CASE stated under 20 & 21 Vict. c. 43, by justices of the county of Somerset.

The appellant was the keeper of a turnpike gate. The respondent was a non-commissioned officer in the West Somerset regiment of yeomanry cavalry.

The respondent arrived at the appellant's gate to pass through it, driving a gig drawn by one horse, and the appellant demanded and took toll from him.

The respondent was dressed in the uniform of the regiment, and was accompanied only by another member of the same regiment, also in uniform, and was going, and on his direct road, to the place appointed for, and on the day for, exercise of the said yeomanry cavalry corps. The appellant contended that the Volunteer Act, 1863, s. 45, did not apply to the yeomanry cavalry corps. The justices having convicted the appellant of taking illegal toll, on the ground that the act did so apply, stated this case.

H. T. Cole, for the appellant. The volunteer force and the yeomanry force are kept distinct throughout the whole of the Volunteer Act, 1863 (26 & 27 Vict. c. 65); thus, in s. 5, it is said that officers of the volunteer force shall rank with officers of the yeomanry force according to the rank and date of their respective commissions in the respective forces. The schedule to the act repeals a large number of former acts relating to corps of yeomanry and volunteers, "so far as the acts relate to volunteers." It is clear, therefore, that a member of a yeomanry corps is not entitled to the exemptions given to volunteers by s. 45. If he rides to the place of exercise he is exempt under the General Turnpike Act, 3 Geo. 4, c. 126, s. 32.

Raymond, for the respondent. It is true that a distinction is

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drawn in the Volunteer Act, 1863, between a yeomanry corps, and a volunteer corps; but s. 45 is expressed in general words, and says any volunteer, not any volunteer under the act, and must be construed more widely. In *Stephenson* v. *Taylor* (1) it was held that an infantry volunteer was exempt under the General Turnpike Act, and this section is intended to remove all doubts, and make the exemption general.

H. T. Cole, in reply.

ERLE, C.J. I am of opinion that our judgment should be for the appellant. The question is whether a yeomanry non-commissioned officer and private *driving* in uniform to the place of exercise are exempt from toll. I think not. The General Turnpike Act contains many exemptions, and amongst others, any horse *rode* by a yeomanry officer, in the uniform of his corps, and having his arms, in going to the place of inspection or review; but the legislature would not, it seems, favour a yeomanry officer *driving* to the place of inspection. Then came the Volunteer Act, 1863, giving the widest and most absolute exemption in favour of volunteers. The respondent claims to be exempt under this act, because he is in one sense a volunteer. But in this act the term "volunteer" is used time after time in contradistinction to "yeomanry," and the act everywhere speaks of the volunteers as having recently come into existence. I think, therefore, the exemption does not extend to members of yeomanry corps.

WILLES, J. I am of the same opinion. I will only add that in the first act in which the exemption was given, it was to yeomanry cavalry and not to infantry, and then subsequently there was an exemption given to volunteer infantry; then came the Volunteer Act, 1863, in which general words are used, but they are limited by the nature of the act, as so often happens, and cannot include members of yeomanry corps.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the appellant.

Attorneys for appellant: *Torr, Janeway, & Tagart.*
Attorneys for respondent: *Whitakers & Woolbert.*

(1) 30 L. J. (M. C.) 145.

SKILLETT and Others *v.* FLETCHER and Another.

1866
Jan. 26.

Principal and Surety—Liability of Surety—Increase of the duties of the principal debtor—Pleading.

Action on a bond conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewers rates for the parish of St. Anne; the bond to continue in force if A. held either office separately. Breach that A. received money in both capacities and failed to pay it over.

Plea, that before breach an act was passed increasing A.'s duties as collector of sewers rates, and under which he was also elected collector of main drainage rates by the persons under whom he held his other appointments:—

Held, bad on demurrer, on the ground that the bond was divisible, and that the plea afforded no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates.

This was an action on a bond. The declaration stated that the defendants entered into a bond in the sum of 1000*l.*, subject to a condition whereby, after reciting that, by 49 Geo. 3, c. xxxix, the churchwardens, overseers of the poor, and vestrymen of the parish of St. Anne's, Limehouse, were empowered to appoint a collector of poor rates, and to take such security as they should deem proper from such collector; and that Edward Day Skillett was, on the 25th of March, 1852, appointed collector of poor rates of the parish, and was on the 26th of March, 1856, appointed collector of the sewers rates and general rates appointed to be levied under the provisions of the Metropolis Local Management Act, 1855; and that it might happen that the said Edward Day Skillett might be appointed from year to year such collector as aforesaid, or be reappointed collector of all, or some, or one of the said rates for the parish, or otherwise be continued in the said offices or office without reappointment; and that it was a condition of the appointment of the said Edward Day Skillett as collector of the rates respectively, that he should find and provide two sureties to become bound with himself in the penal sum of 1000*l.* for the due performance of his said office for the whole period of time during which he should continue in the said office of collector of all, or some, or one of the said rates; and that the defendants had consented to become such sureties; the condition of the bond

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was declared to be such that, if the said Edward Day Skillett should at all times during the whole time that he should continue in the said office of collector of all, or some, or one of the rates aforesaid, well and truly and effectually perform the duties of the said office [of collector of the said rates respectively, and should duly and faithfully account to, and on the request of the churchwardens and overseers of the said parish, or any three of them, well and truly pay to them all and every the sums of money that should from time to time be collected or received by him by virtue of the said acts respectively, or otherwise, in execution of his said office of collector of all, or some, or one of the said rates, and also should, upon such request, deliver to them a particular, true, and perfect account of all moneys received by him by virtue of his said office, then the said bond should be void and of no effect; but otherwise should be and remain in full force and virtue. Averments. That Edward Day Skillett continued in the said office of collector of the said rates, and collected divers sums of money by virtue of the said acts, or otherwise, in execution of his office of collector of the said rates; that he did not, during the period of time that he continued in the said office of collector, well or truly perform the duties of the said office of collector of the said rates respectively, in this, that he did not account for and pay over the said moneys, but therein wholly failed and made default, and appropriated and applied the money to his own use, contrary to his duty as such collector; that he did not duly account for or pay over, on the request of the churchwardens and overseers, which was duly made, the money collected by him by virtue of the said acts, and otherwise in execution of his office of collector of the said rates; that he did not make a written statement to the parish authorities of the money he had collected and levied by virtue of the said acts and otherwise in execution of his said office; and that all conditions precedent to the maintaining of this action had been fulfilled.

Eighth plea. That the bond was made before the passing of the 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102; that the said acts were in force before and at the time of the alleged breaches; that the duties of Edward Day Skillett in his office of collector of the said rates were much increased, varied, altered, and enlarged by virtue

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and in pursuance of the said acts; that the said office was altered, varied, and enlarged by the said acts; that the said office of collector, and the duties, liabilities, and responsibilities thereof, was by the said acts altered and varied, and made another and different office, with further, other, and larger duties, liabilities, and responsibilities, from the respective times of the coming of the said acts into effect, to the said office and its duties and liabilities and responsibilities at the time of the making and execution of the said bond; that the said Edward Day Skillett, so being such collector as aforesaid, was by the churchwardens and overseers of the poor and the vestrymen acting for the parish of St. Anne's, Limehouse, after the passing of the 21 & 22 Vict. c. 104, appointed to be collector of the main drainage rate, to be assessed and levied under that act in the same manner and subject to the like provisions as the sewers rate in the condition of the bond mentioned; that the defendants had no previous notice of such last-mentioned appointment, and did not assent thereto; and that the said Edward Day Skillett did not give any further security whatsoever for the due discharge and faithful performance of the duties of the last-mentioned office; that as such collector of the main drainage rate, and by virtue of the said office of collector, and in the proper discharge of the duties thereof, the said Edward Day Skillett received divers large sums of money, being other and greater sums than those he was entitled and appointed to receive under the office in the bond mentioned, and had other duties to discharge, and by means of the premises the responsibilities of the said Edward Day Skillett were greatly increased and altered, and the risk of the defendants, as his sureties, varied and increased; that under and by virtue of the 25 & 26 Vict. c. 102, the said Edward Day Skillett, in addition to the rates and sums of money mentioned in the bond, became, by virtue of his being such collector as is mentioned in the bond, and otherwise by virtue of the said act, collector of certain sums of money included by the said last-mentioned statute in the sewers rate, for the purpose of defraying the expenses of the Metropolitan Board of Works; the said moneys being sums other than, and additional to, those which, as such collector, as in the bond mentioned, and by virtue of his office, he was entitled and bound to collect, before the coming into

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effect of the said act; that after the passing of the last-mentioned act, Edward Day Skillett, by virtue and under the provisions of the same, became collector of a separate rate for the metropolis main drainage, levied in the same manner and for the same period, upon the same persons, and subject to the like provisions as the sewers rate in the bond mentioned; whereby the said Edward Day Skillett became entitled and bound to collect further, other, and additional moneys to those which, as such collector, as mentioned in the bond, he was appointed, entitled, and bound to collect, and had numerous further and additional duties to discharge, whereby the risk of the defendants, as his sureties, under the bond was greatly altered and increased; that all the breaches of the conditions in the bond in the declaration mentioned, happened after the passing and coming into effect of the said acts, and after the happening of the several other facts, matters, and things in the plea before alleged.

Demurrer and joinder.

Gibbons, for the plaintiffs. The bond is distributable; and if the duties of Skillett, as collector of the sewers rates, were altered, as the defendants contend, by subsequent acts of parliament, yet his duties as collector of poor rates remained unaltered; and as the declaration alleges that he failed to account for, or pay over, the money received for the poor rates, the plea is not an answer to the whole declaration, and is therefore bad.

Philbrick (*Mellish, Q.C.*, with him), for the defendants. The declaration treats of the whole duties of Skillett as collector as one office, which might extend to the collection of both the poor rates and the sewers rates, or might be confined to one, and it is therefore within the principle of *Bonar* v. *Macdonald*. (1) If by the same bond a man becomes surety for the performance by another of the duties of two offices, any alteration of the duties of either of the offices will relieve the surety from the obligation of his bond. For it may well be that a man who is willing to be surety for the performance by another of the duties of two particular offices, or of either of them separately, would not be willing to be surety for the performance by him of the duties of one of

(1) 3 H. L. C. 226.

them if combined with a wholly different and more responsible office. For instance, if the poor rates amounted to 5000*l.* a year, and the sewers rates to 5000*l.* a year, when the bond was given, and by after legislation the amount of the sewers rates were increased to 20,000*l.* a year, the risk of the failure of the principal debtor in the collection and payment over of the poor rates would be increased, as well as the risk of his failure in his duties in respect of the sewers rate. The authorities shew that you cannot sever the duties of the office held by the principal debtor to see whether his failure is in respect of the original or of superadded duties, *Pybus* v. *Gibb* (1): therefore the fact that the defendants would have been liable for the breach by Skillett of his duties as collector of poor rates, if the sewers rates had not been altered, will not affect the present question. Moreover, the plea avers that Skillett was appointed by the same parties to a wholly new and additional office, that of collector of the main drainage rates, and this would of itself discharge the sureties: *Pybus* v. *Gibb.* (1)

[MONTAGUE SMITH, J. The surety would be under no liability as respects the new office, and how therefore could he be affected by the appointment?

ERLE, C.J. If A. is appointed rent collector for Blackacre, and B. becomes surety for him, and the same landlord subsequently appoints A. also rent collector for Whiteacre, do you say that that would discharge the surety?]

Yes; the responsibility of the principal debtor, and the risk of the sureties would be increased. In the present case it is alleged in the plea and admitted by the demurrer that the risk of the defendants was varied and increased by the appointment of Skillett collector of the main drainage rates. Of course if the appointment to the new office were by a third party, it would not affect the liability of the surety; as a third party could not alter the rights of the creditor. In *Mayor of Berwick* v. *Oswald* (2) it was assumed that any alteration in the duties of the office would have relieved the surety.

Gibbons, in reply. In *Bonar* v. *Macdonald* (3) there was a

(1) 6 E. & B. 902, 913; 26 L. J. (Q.B.) 41.
(2) 3 E. & B. 653; 23 L. J. (Q.B.) 321. (3) 3 H. L. C. 226.

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breach of an express covenant that the principal debtor should not be employed in the additional duties which he in fact undertook. In *Mayor of Berwick* v. *Oswald* (1) the question raised was whether the change of the appointment from an annual one to an appointment during pleasure, took the appointment out of the terms of the bond. In *Pybus* v. *Gibb* (2) the duties of the original employment were entirely altered.

ERLE, C.J. I think that our judgment should be for the plaintiffs. The action is brought on a bond which was given by the defendants, as sureties of one Skillett, for the due performance of his duties as collector of the poor rates, and also as collector of the sewers rates and general rates to be levied under the authority of the Metropolitan Local Management Act, 1855. The bond recited that Skillett was bound to find sureties "for the due fulfilment of the said office for the whole time he should continue in the said office of collector of all, or some, or one of the said rates." It clearly contemplated, therefore, the employment as collector of the different rates being divisible. The condition of the bond was for the due performance of his duties by Skillett; and it is averred, that he had collected and received divers sums of money by virtue of the said acts and otherwise in execution of his said office of collector of the said rates, and had not paid them over. The plea is to the effect that after the bond was given an act was passed by which the main drainage rates were imposed, and that it fell to Skillett to collect them in addition to the other rates; and that thus additional duties and responsibilities were imposed on him. I shall give no opinion as to whether the subsequent acts altered Skillett's duty as collector of the sewers rates and general rates under the act of 1855. I think the plea is bad, because it does not answer the whole cause of action alleged in the declaration. I think there is a cause of action arising from Skillett having received sums of money as collector of the poor rates, and not paid them over, and also a cause of action arising from Skillett having received sums of money as collector of the sewers and general rates and not paid them over, and that these are perfectly distinct. If the defendants had given two bonds it is clear that

(1) 3 E. & B. 653; 23 L. J. (Q.B.) 321.

(2) 6 E. & B. 902; 26 L. J. (Q.B.) 41.

an increase of the duties of one office which discharged the sureties from their liability in respect of one bond, would not have discharged them from their liability on the other bond; and I think that the result is the same here though there is only one bond. In the cases referred to, there was a change in the nature of the employment, so that the risk of the sureties, if it had continued at all, would have been different and increased. Thus in *Bonar* v. *Macdonald* (1) there was a fresh arrangement made with the principal debtor, by which he had a different salary on his undertaking not merely to be the manager of the branch bank but also to take part of the risk of the discount business. And so the office of bailiff of a county court under the new act was really a different office from that which existed before it. (2)

WILLES, J. I am of the same opinion. The declaration alleges that the principal debtor was appointed in 1852 collector of poor rates, and in 1856 collector of sewers and general rates, and that he might have been reappointed collector of all, or some, or one of the said rates; and that the bond was given by the defendants for the purpose of securing his proper conduct as collector of the poor rates and of the sewers and general rates, during the whole time that he should continue in the said office of collector of all, or some, or one of the said rates. It then avers that the principal debtor misconducted himself by not accounting for or paying over the rates. Now, this declaration might be proved by shewing, first, that he was collector of the poor rates, and did not account for them or pay them over; or, secondly, that he was collector of the sewers and general rates, and did not account for them or pay them over; or, thirdly, that he was collector of both rates, and did not account for them or pay them over. Now, to this declaration, which might be proved by shewing that, being collector of the poor rates, he failed to account for them or pay over the amount, the defendants plead that there were certain acts passed which authorized the main drainage rates; and first, that there was a new appointment of the principal debtor to be collector of these rates; and, secondly, that as collector of the sewers and general rates, it was his duty to collect these new rates, and that thereby new liabilities and responsibilities were

(1) 3 H. L. C. 226. (2) *Pybus* v. *Gibb*, 6 E. & B. 902; 26 L. J. (Q.B.) 41.

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imposed on him. A plea to be good must afford an answer to every possible state of facts which would support the right of action alleged in the declaration; the question therefore is whether the above circumstances discharge the sureties from their obligations in respect of the collection by Skillett of the poor rates. I think they do not. A distinction ought to be observed between new duties which only affect the surety indirectly, by increasing the temptations of the principal debtor to be dishonest, and new duties for the due performance of which the surety himself under his bond would be liable, if the same continued valid. To the latter class belong *Bonar* v. *Macdonald* (1) and *Pybus* v. *Gibb*. (2) Unless this plea establishes an alteration in the principal debtor's obligations with respect to the poor rates, it is bad. In *Bonar* v. *Macdonald* (1), the House of Lords did not lay down that if any addition is made to the duties of the principal debtor, by a distinct contract with a distinct consideration, it would discharge the surety. In that case, the defendants, who were sureties for a clerk in a bank, agreed that their liability should continue on his being appointed manager of a branch bank, on condition that he had nothing to do with the discount transactions; afterwards his salary was raised on condition of his taking the risk of one quarter of the discounts; so that he had one salary for his former office and his additional labour and liability. There was, in fact, a new contract substituted for the old one; and it was on this ground, that the contract, for the performance of which the sureties had been liable, had been thus annulled, and a fresh one substituted for it, that it was held that the liability of the sureties had ceased to exist. (See Lord Cottenham's judgment, quoted by Lord Brougham.) The case of *Pybus* v. *Gibb* (2) is similar; there by the County Court Act of 1857, the office held by the principal debtor was changed into a new office differing from the old one in essential respects. These two were the strongest cases that Mr. Philbrick could produce. In the present case the parties evidently considered the office of collector of poor rates as an entirely distinct employment from that of collector of the sewers and general rates, and one as to which there might be a distinct liability. The question, in fact, is the same

(1) 3 H. L. C. 226. (2) 6 E. & B. 902; 26 L. J. (Q.B.) 41.

as if there had been two separate bonds, which would have been the case if Skillett had ceased to be collector of the sewers rates, and then had been appointed collector of the main drainage rates. The authorities, therefore, are wholly inapplicable. It could not be, and was not said, that the mere fact of the principal debtor having additional employment, and receiving a larger amount of money, which would be an increased temptation to dishonesty, relieved the sureties from responsibility.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion. The bond stated that Skillett was appointed to the two offices, whose duties he undertook to perform, at two different times; and I think that throughout the whole of it there are indications that it is to be taken distributively. It is the same, therefore, as if there had been two bonds; and if that had been so, the appointment of Skillett collector of the main drainage rates could not have affected the liability of the defendants with respect to his neglect of duty as collector of the poor rates. There is nothing to shew that collecting the poor rates took up the whole time of Skillett, or that the new employment in any way interfered with his performance of his former duties. The cases in which the sureties have been discharged have all been cases in which the contract, the performance of which the sureties guaranteed, had been enlarged or altered, as is laid down in Bell's "Principles of the Law of Scotland"(1), quoted in Lord Cottenham's judgment in *Bonar* v. *Macdonald* (2); if the new contract is distinct the sureties are not discharged.

Judgment for the plaintiffs.

Attorney for plaintiffs: *A. A. Walter.*
Attorneys for defendants: *Walters & Gush.*

(1) 5. Ed. p. 95. (2) 3 H. L. C. 226.

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Jan. 19.

THE ANGLO-AFRICAN COMPANY, LIMITED, *v.* LAMZED AND OTHERS.

Shipping—Construction of Charterparty—Master's Duty in loading the Ship.

It is no answer to an action against a ship-owner for not loading a full cargo, pursuant to a charterparty which contained a stipulation that "the charterer's stevedore was to be employed by the ship," that the charterer had failed to appoint a stevedore,—the charterer's option so to do not dispensing with the ordinary duty of the master properly to load the ship.

THE declaration stated, that the plaintiffs and defendants agreed by charterparty that the defendants' ship *Marianne*, being tight, staunch, &c., should with all convenient speed sail and proceed to the West India Docks, or so near, &c., and there load from the factors of the plaintiffs such lawful merchandize as they might have to ship, and therewith proceed to Sierra Leone and the island of Sheilio, if required, and there deliver the same, and re-load such lawful merchandize as might be sent alongside at either port, which the plaintiffs bound themselves to ship, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, &c.; and, being so loaded, should therewith proceed to London, Bristol, or Liverpool, as ordered on signing bill of lading, or so near, &c., and deliver the same on being paid for freight a lump sum of 550*l.* for the voyage out and home, and 5*l.* 5*s.* gratuity to the master (certain perils always excepted): Averment, that the ship loaded an outward cargo according to the charterparty, and therewith proceeded on the outward voyage, and delivered the same according to the charterparty, and that the plaintiffs were always ready and willing to ship a homeward cargo according to the charterparty, and that before action brought, all conditions had happened, &c., to entitle the plaintiffs to have the charterparty performed by the defendants, &c.: Breach, that the defendants, although not prevented by any of the excepted perils, made default in re-loading such lawful merchandize as was sent alongside the ship at the ports mentioned in the charterparty, not exceeding what the ship could reasonably stow and carry over and above her tackle, apparel, &c., and by reason thereof a great part

of the cargo provided for the said ship by the plaintiffs, and which the ship could and ought to have loaded, according to the terms of the charterparty, was left behind, and by reason of the premises the plaintiffs were deprived of the profits they would have gained from the said merchandize being loaded on board the said ship according to the terms of the charterparty, and had been compelled to provide other means of transport for the same, &c.

Fourth plea,—after setting out the charterparty, which was made between W. Silly, the master, and Messrs. Spyer & Heywood, as agents for the plaintiffs, and which contained, amongst others, the following provisions, "charterers' stevedore to be employed by ship," and "the cargo to be discharged from alongside, as customary, by the regular traders, and to be brought alongside at charterers' risk and expense,"—averred that, according to the form and effect of the charterparty, a stevedore was to be provided by the plaintiffs to re-load and stow the ship, which stevedore was to be employed by the defendants for that purpose; and that, such stevedore being so employed by the defendants as aforesaid, the defendants, according to the usage of merchants, would not be responsible or liable to the plaintiffs for or in respect of any default in such re-loading and stowing; and the defendants were ready and willing to perform the said charterparty on their part, and to employ the charterers' stevedore as therein agreed, whereof the plaintiffs had notice; but the plaintiffs did not nor would provide any stevedore for the purpose of re-loading and stowing the said homeward cargo, according to the charterparty; and that, by reason of the default of the plaintiffs in that behalf, the master of the said ship was forced and obliged to and did re-load the cargo without the assistance of any stevedore, and did re-load and stow the same to the best of his skill and ability; that the plaintiffs' alleged cause of action is for and in respect of the ship not having re-loaded so much merchandize for the homeward cargo as she might have re-loaded if a competent stevedore had been provided and employed in and about the re-loading and stowing of the said cargo; and that the alleged breach of the charterparty was caused by such default of the plaintiffs as aforesaid, and not otherwise.

Demurrer to the fourth plea, on the ground that "the charter-

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party gives the charterers an option of appointing a stevedore, but imposes on them no obligation so to do." Joinder.

Further replication to the fourth plea, that, before and at the time of making the charterparty, and thence until and at the time of loading the homeward cargo, there was not any stevedore, or person carrying on the business of a stevedore, at Sierra Leone or the island of Sheilio, as the plaintiffs and the defendants and the said W. Silly and Messrs. Spyer & Heywood respectively well knew at the time of making the charterparty; but that there was at the West India Docks, before and at the time of making the charterparty, and at the time of loading the outward cargo, a number of stevedores, as the plaintiffs and the defendants and the said W. Silly and Messrs. Spyer & Heywood well knew at the time of making the charterparty.

Demurrer to the replication, on the ground that "the facts therein stated cannot vary the contract of the parties." Joinder.

Sir G. Honyman, for the plaintiffs. The fourth plea is clearly bad. It assumes that the plaintiffs were bound by the terms of the charterparty to appoint a stevedore. That, however, is not the true construction of the instrument. It was intended to give the charterers an option to appoint a stevedore, but it imposes upon them no obligation to do so. In the absence of an express stipulation to the contrary, it is the duty of the master properly to stow the cargo: *Blaikie* v. *Stembridge* (1); *Sack* v. *Ford*. (2) If the plea be held bad, it will be unnecessary to say anything in support of the replication, which was only pleaded for the purpose of shewing the circumstances under which the charterparty was made, and so aid the Court in putting a right construction upon it.

Quain, contrà. Reading the plea with the declaration, the breach is that the ship did not load as full a cargo as she might have had if a stevedore had been employed; it is not necessary, therefore, to contend that the appointment of a stevedore was obligatory on the charterers. If the charterers did not choose to

(1) 6 C. B. (N.S.) 894; 28 L.J. (C.P.) 329; in error, 6 C.B. (N.S.) 911; 29 L.J. (C.P.) 212.

(2) 13 C.B. (N.S.) 90; 32 L.J. (C.P.) 12.

appoint a stevedore, they could not complain that as full a cargo was not loaded as might have been put on board if a competent stevedore had been employed.

[WILLES, J. The master is by law required to be a competent stevedore himself.]

In *Sack* v. *Ford* (1), the charterparty contained express words making the owner liable, notwithstanding the appointment of a stevedore. The present case is more like *Blaikie* v. *Stembridge* (2), where, though the charterparty contained a stipulation that a stevedore for the outward cargo was to be appointed by the charterer, but to be paid by and to act under the captain's orders, it was held that the stevedore was not the servant or agent of the master, so as to make him responsible for negligent stowage.

Sir G. Honyman was not called upon to reply.

ERLE, C. J. By the terms of their contract the defendants were bound to re-load the ship with any lawful merchandize which the charterers' agents should send alongside, not exceeding what the ship could reasonably stow and carry. That is the ordinary duty of every owner who charters his ship. If he fails to put on board a full cargo, he is guilty of a breach of contract. The plea now in question is founded upon a stipulation in the charterparty that "the charterers' stevedore shall be employed by the ship;" and the defence suggested is, that, by reason of the plaintiffs' failure to appoint a stevedore, a less full cargo was shipped than otherwise might have been shipped. That clearly is no defence at all. If the defendants had meant to say that as much cargo was loaded as could reasonably have been loaded, that would have been simply a denial of the breach. The plea, in truth, assumes that it was a condition precedent that a stevedore should be appointed by the charterers. That, however, is a fallacy: the stipulation was introduced for the purpose of giving the charterers an option. If they chose to exercise the option, it would be the master's duty to employ and pay the stevedore so appointed. If they did not, the

(1) 13 C. B. (N.S.) 90; 32 L. J. (C. P.) 12.

(2) 6 C. B. (N.S.) 894; 28 L. J. (C.P.) 329; in error, 6 C. B. (N.S.) 911; 29 L. J. (C.P.) 212.

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master was still bound to take on board as much cargo as the ship could reasonably carry. . .

WILLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment for the plaintiffs.

Attorney for plaintiffs: *J. I. Solomon.*

Attorneys for defendants: *Marshall & Roberts.*

TOMLINSON *v.* GOATLY.

Jan. 29.

Practice—Leave to proceed under s. 17 *of the Common Law Procedure Act*, 1852, 15 & 16 *Vict. c.* 76—*Discretion of Judge at Chambers.*

The Court will not interfere with the discretion of a judge at chambers in refusing leave to proceed without personal service, under the 17th section of the Common Law Procedure Act, 1852.

Semble, that it is not in all cases imperative to shew attempts to serve the defendant at his place of *residence*, where he has a place of business at which he is usually to be found.

Kingdon moved for leave to proceed, without personal service, under the 17th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), after an unsuccessful application before Byles, J., at chambers, upon an affidavit which was in substance as follows:—That, on the 11th January instant, the deponent called at the office of the defendant, No. 5, Bow Street, Covent Garden, for the purpose of serving him with a writ of summons under the Bills of Exchange Act (18 & 19 Vict. c. 67), issued in an action upon a bill of exchange accepted by him payable at that place; that the deponent there saw a clerk of the defendant, who informed him that the defendant was not then in, and that three o'clock was the best time to see him; that the deponent then made an appointment with the clerk to call on the following day at three o'clock; that the deponent attended at the office at three o'clock on the 12th instant, and saw the same clerk, who informed him that the defendant was not then in, but that he had been at the office in the course of the day, and he expected him there again in the course of the afternoon; that the deponent thereupon left with the clerk a copy of the writ inclosed in an envelope addressed to the defendant, and requested the clerk

to deliver it to him, and said that he would call again for an answer; that, on the 17th, the deponent called again at the office and saw the same clerk, who informed him that the defendant was not then in, that he had been there in the course of the day, but he (the clerk) could not say whether or not he would be there again, nor could he make any appointment, or inform the deponent where he could see the defendant; that, on being asked if he had given the envelope to the defendant, the clerk informed the deponent that he had done so on the day on which it was left with him, and that there was no answer; that the deponent made all reasonable efforts and used all due means in his power to serve the defendant personally with a copy of the writ, and had not been able to do so, and for the reasons aforesaid he verily believed that the writ came to the knowledge of the defendant on the 12th January instant; and that search was made on the 24th instant, and no appearance had been entered.

The learned counsel submitted, that the affidavit disclosed abundant efforts to serve the defendant personally, and afforded reasonable grounds for believing that the writ had come to his knowledge and that it was not necessary,—the bill having been accepted payable at the defendant's office,—to shew that any attempt had been made to serve the defendant at his place of residence (Bromley, in Kent), which the learned judge seemed to require, but which in such a case as this would evidently have been a useless aggravation of the expense.

ERLE, C. J. Whether or not the efforts made to serve the defendant are reasonably sufficient, must in all cases be matter for the discretion of the judge. We cannot interfere, without laying down some general rule; and this can hardly be done, seeing that each case must depend upon its own particular circumstances. Neither do I mean, by refusing this rule, to lay it down that attempts to serve the defendant at his residence are in all cases indispensable, where he has a separate place of business.

WILLES, J. I also am of opinion that there should be no rule. If these matters were not left to the discretion of the judge, the result would be that many applications of this sort would be made, and so much useless increase of costs occasioned. I therefore

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think it would be establishing a bad precedent to interfere. I entirely agree with my Lord in thinking that it is not necessary to go to the defendant's residence, if the judge is satisfied that under all the circumstances it was reasonable to look after him at his place of business. There is, however, upon this affidavit matter which might reasonably have induced the learned judge to refuse the application. There seem to have been only two calls and one appointment; and there is no statement by the process-server to the defendant's clerk of the purpose for which he wanted the appointment.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorney for plaintiff: *W. W. Comins.*

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Nov. 18.*

MARSDEN *v.* THE CITY AND COUNTY ASSURANCE COMPANY.

Insurance, on Plate-glass—Proximate Cause of Loss or Damage—Notice of Loss—Agent.

By a policy of insurance, plate-glass in the plaintiff's shop-front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises,"—none of the glass being "horizontally placed or moveable." A fire broke out on premises adjoining those of the plaintiff, and slightly damaged the rear of his shop, but did not approach that part where the plate-glass was. Whilst the plaintiff, assisted by neighbours, was removing his stock and furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, and broke the windows for the purpose of plunder:—

Held, that the proximate cause of the damage was the lawless act of the mob, and that it did not originate from "fire, or breakage during removal," within the exception in the policy.

The policy, which had been effected through L., the local agent of the defendants, was subject, amongst others, to a condition, that "in case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the company." After the making of the policy, and before the loss, the defendants had transferred this branch of their business to another company. The plaintiff (not being aware of this transfer) gave notice of the damage to L., who made his report thereon to the latter company:—

Held, that the notice to L. was a sufficient notice, within the above condition.

THE declaration was on a policy for the insurance of certain plate-glass from all loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair

* Decided in Mich. Term, 1865.

of premises, subject to the conditions and stipulations thereon indorsed, and which constituted the basis of that insurance,—none of the glass being horizontally placed or moveable. The conditions were then set out, and the declaration alleged that the plaintiff was interested in the plate-glass insured, that it was damaged and destroyed by causes other than fire, or breakage during removal, alteration, or repair of the premises, and that thereby the plaintiff suffered loss and damage on and in respect of the plate-glass, originating from causes other than as aforesaid, within the true intent and meaning of the policy, to the amount of 29*l.* 17*s.* 6*d.* The declaration then averred performance of all conditions precedent, &c., and alleged for breach non-payment of the amount of damage.

The defendants pleaded, first, non est factum; secondly, that the plate-glass in the declaration mentioned was not, whilst the policy was in force, damaged or destroyed by causes other than fire, or breakage during removal, alteration, or repair of premises; thirdly, that no claim was made, with such an account of the loss or damage as in the policy mentioned and specified, within the time in the policy mentioned.

Issue thereon.

The cause was tried before Byles, J., at the last assizes at Monmouth. The facts were as follows:—The plaintiff was a draper at Tredegar who had effected an insurance with the defendants' company on certain plate-glass windows in his shop-front, for one year ending at Lady Day, 1865. By the policy, which was put in, and which was headed "Plate-Glass Policy," it appeared that the insurance was made upon the terms mentioned, and subject to the conditions referred to in the declaration; the material conditions being the second and the fifth, which were as follows:—

2. "In case of loss or damage, an immediate notice must be given to the manager or to some known agent of this company as soon as possible after the happening of the loss or damage. The claimant must deliver an account stating the particulars of the loss or damage sustained, and, where fraud may appear or be suspected, make proof of the same, if required by the directors, and by the production of such further evidence as they may reasonably require; and, if any fraud shall appear in the claim made for such

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loss, or if any false declaration shall have been made in support thereof, or if no claim shall be made, with such an account of the loss or damage, and so verified as before mentioned, if required, within the space of ten days from the happening of the loss or damage, or if any alterations shall have been begun before due notice is given as aforesaid, the insured shall be excluded from all benefit by virtue of his policy."

5. "If any alteration shall be made, or change or other event shall occur in or about or in any wise relating to any property assured by the company against loss or damage, at any time after such assurance shall have been effected, so as to increase the risk or hazard of such loss or damage, it shall be the duty of the person who either originally or by assignment shall be entitled to such insurance, forthwith to leave notice of the fact, nature, and extent of such risk, at the chief office of the company, and the directors shall thereupon be entitled to make such alteration in the terms of such policy as they shall think under the circumstances of the case to be fit; and, in case any such person or persons so entitled as aforesaid shall for twelve calendar months or upwards after any such change, or until a loss or damage shall happen, whether within such twelve calendar months or not, fraudulently neglect or omit to leave such notice, or shall, after leaving such notice, refuse to concur in the alteration in the terms of the policy consequent thereupon which shall be proposed by the directors, such policy shall be absolutely forfeited to the said company."

The proposal for the insurance was deposited with one Lewis, who acted as agent of the defendants at Tredegar. The policy was forwarded from the company's office in London to Lewis, whose name appeared thereon as agent, and by whom the premium was received and the policy handed over to the plaintiff.

On the evening of the 24th of March, 1865, a fire broke out on the premises next adjoining to the plaintiff's, and a small portion of the back part of his house was burnt; but the fire did not touch the front, where the plate-glass was. Whilst his neighbour's premises were burning; the plaintiff, assisted by some friends, commenced removing his stock-in-trade and furniture; and, whilst this was going on, the shutters were torn down by the assembled mob, and the plate-glass windows broken for the

purpose of plunder. On the day following, the plaintiff gave notice of the damage to Lewis, who thereupon made his report to The London and General Plate-Glass Company, Limited, to whom (unknown to the plaintiff) the defendants had in August, 1864, assigned their plate-glass insurance business, and who took upon themselves all liabilities which might arise from that date in respect of policies on plate-glass effected with the defendants: and this action was defended on behalf of the last-named company. Lewis communicated the loss to the secretary of that company in London, who sent him down a printed form to be filled up by the plaintiff with the full particulars of his claim. This being done, the paper was returned by Lewis to the secretary.

On the part of the defendants it was submitted, that the damage sued for was occasioned by fire or by breakage during removal, and consequently was excluded by the terms of the second condition of the policy; and, further, that, Lewis being no longer agent for the defendants, there was no evidence of notice of the damage to them, as required by that condition.

Under the direction of the learned judge, a verdict was taken for the plaintiff, for the amount of his claim, leave being reserved to the defendants to move to enter a nonsuit, on the grounds "that the damage did ~~not~~ originate from fire and removal, and that there was no sufficient claim under condition 2 of the policy."

Powell, Q.C., in Michaelmas Term accordingly obtained a rule nisi.

H. Matthews, and *Huddleston, Q.C.*, shewed cause. The house adjoining the plaintiff's caught fire. The plaintiff, finding his premises in danger of being burnt, and the back part being actually on fire, began to remove his stock and furniture. Whilst this was being done, the mob tore down the shop shutters, broke the plate-glass front, and plundered the shop. Upon these facts, the question is whether the cause of damage to the subject of insurance was fire or removal.

[BYLES, J. The fire was the original cause, but not the proximate cause. But for the fire next door, this damage would not have occurred. The question is whether we can look beyond the proximate cause of damage.]

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The remote cause of loss or damage cannot be regarded either in fire or in marine policies. This is well exemplified by the recent case of *Ionides* v. *The Universal Marine Insurance Company.* (1) There, goods were insured by a policy which contained the following warranty,—"Warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and *free from all consequences of hostilities*, riots, or commotions." The ship and cargo were lost by stranding occasioned by the removal, for the purpose of hostilities between two foreign powers, of a light on the coast of North Carolina: and this Court held that the *proximate* cause of the loss was a peril of the sea, and not the act of hostility in extinguishing the light. Several earlier authorities were there referred to; amongst others, *Livie* v. *Janson* (2), where a ship, warranted "free from American condemnation," partially damaged by being driven on shore by force of the wind, ice, and tide, was got off, and afterwards captured and condemned by the American government for breach of embargo, and it was held, that, as there was ultimately a *total* loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous *partial* loss arising from the stranding, which in the event became wholly immaterial to the assured, although but for the stranding the vessel would not have been captured; and *Green* v. *Elmslie* (3), where it was ruled by Lord Kenyon, that, if a ship be driven by stress of weather on an enemy's coast, and there captured, the loss is a loss by capture, and not by the perils of the sea. Analogous to these is the case of *Austin* v. *Drewe* (4), where damage done to the stock of a sugar-baker from excess of heat through the mismanagement of a regulator by the plaintiff's servants, was held not to be a loss by fire within the terms of a policy against damage by fire. The same rule is laid down in *Redman* v. *Wilson.* (5) There, a vessel rendered unseaworthy from negligent stowage of the cargo was run ashore to prevent her from sinking, and to save the cargo; and it was held, that, the immediate cause of the loss being a peril of the sea, the under-

(1) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(2) 12 East, 648.
(3) Peake, 278.
(4) Holt, 126; 6 Taunt. 436; 2 Marsh. 130.
(5) 14 M. & W. 476.

writers were liable. So, in *Everett* v. *The London Assurance* (1), premises were insured against "such loss or damage as should or might be occasioned by *fire* to the property therein mentioned;" and it was held that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. There, fire was a much more direct cause of the damage than here; for, any commotion or riot in the street might have occasioned the same result. Then, was the damage caused by "breakage during removal," within the condition of the policy? That clearly refers to damage done to the plates in removing them from the place where they are fixed, for the purpose of using them elsewhere, not to damage sustained during the removal of stock or furniture. As to the sufficiency of the notice,—Lewis was the agent of the defendants when the policy was granted, and the insurance was negotiated through him. The plaintiff had no intimation that he had ceased to be their agent, or that the defendants had transferred their business. A notice, therefore, to Lewis was clearly a good notice within the second condition.

Powell, Q.C., and *G. Milward*, in support of the rule. The policy in question differs from those in all the cases cited: the parties evidently contemplated a totally distinct contract from those to be found in any of the authorities. This is not an exception "from loss or damage except by fire," as the argument on the other side seems to assume, but "from loss or damage *originating* from any cause whatsoever except fire," &c. What did this loss originate from? Clearly from the fire which broke out in the adjoining premises. That would have been its origin even though the fire had never touched any part of the plaintiff's premises. In construing this policy, regard must be had to the peculiar nature of the subject of insurance, and the dangers to which it is exposed. Heat and the application of water will crack glass, even though it does not come into immediate contact with fire. But for the happening of the fire, it is quite manifest there would have been no damage. Then, it is clear from the evidence that the plaintiff was in the act of removing his stock and furniture at the time the breakage occurred. The case, therefore, comes within the excep-

(1) 19 C. B. (N.S.) 126; 34 L. J. (C.P.) 299.

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tion as to "breakage during removal." These words do not mean, as contended on the other side, to limit the exception to the removal of the plate-glass itself; otherwise the subsequent words, "none of the glass being horizontally placed or moveable," would be altogether insensible. The 5th condition indorsed on the policy provides, that, "if any alteration shall be made, or change or other event shall occur, in or about, or in any wise relating to, any property assured by the company against loss or damage, at any time after such assurance shall have been effected, so as to increase the risk or hazard of such loss or damage, it shall be the duty of the person or persons who either originally or by assignment shall be entitled to such assurance, forthwith to leave notice of the fact, nature, and extent of such risk, at the chief office of the company; and the directors shall thereupon be entitled to make such alteration in the terms of such policy as they shall think under the circumstances of the case to be fit." The fair inference from that, is, that the exception was not intended to provide for the removal of the plate-glass itself, that being provided for by the above condition, but to apply to the removal of the goods of the assured from the premises where the plate-glass is fixed.

[BYLES, J. That would include a removal by reason of insolvency or other cause, as well as a removal in consequence of an outbreak of fire.]

ERLE, C.J. The conclusion I have come to is, that this rule should be discharged. The action is upon a policy of insurance on plate-glass; and the question is, whether the damage in respect of which the plaintiff claims compensation is within an exception contained in the policy. The insurance is against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises." The defendants contend that this loss originated from fire or from breakage during removal, and so is within the exception. The circumstances were these:—The glass insured was plate-glass in the plaintiff's shop-front. A fire occurring in some premises adjoining the plaintiff's, and communicating with a distant part of the plaintiff's house, the plaintiff got some of his neighbours to assist him in removing his

furniture and stock-in-trade; and, whilst they were thus engaged, the assembled mob feloniously broke in the windows for the purpose of plunder. Hence, no doubt, the remote cause of the damage was fire: but the proximate cause was the lawless violence of the mob. I think the general rule of insurance law, that the proximate and not the remote cause of the loss is to be regarded, is the rule which must govern our decision in this case. The assembling of the crowd was caused by the fire; and but for the fire probably the plaintiff's windows would not have been broken. But the breakage was not caused by the fire; it was the result of the plaintiff's attempt to save his stock and furniture, coupled with the desire of the mob to seize what they could lay their hands on. I do not see how that can be said to be a damage originating in or caused by fire, so as to bring it within that part of the exception. Then, was it a loss from "breakage during removal"? I was at first inclined to think that those words applied only to a breakage occurring whilst the plate-glass itself was being removed. The policy excludes moveable plate-glass, such as looking-glasses. Possibly, however, that may not be the true meaning; and it may mean to except breakage occurring during the removal of the assured's goods from the premises. If that be the true meaning of the exception, the facts do not bring the case within it. The plaintiff was not removing from the premises: but, on the occurrence of a sudden emergency, the plaintiff was endeavouring to transport his property to a place of safety, when plunderers broke in and carried away a part. I do not think that was the sort of removal that could have been contemplated by the parties. Then, as to the sufficiency of the notice,—It appeared that Lewis was the defendants' agent at Tredegar at the time this policy was effected, and that it was through him that it was negotiated. Whilst the policy was running, the defendants assigned their plate-glass insurance business to another company called The London and General Plate-Glass Insurance Company, who are the real defendants in this action. No notice, however, was given to the plaintiff of this transfer, or that Lewis had ceased to be the defendants' agent. I think, under the circumstances, the defendants are not entitled to contend that a notice to Lewis was not a notice to them.

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WILLES, J. I am of the same opinion. As to the first question, it is clear that fire was not the proximate cause of the damage. The proximate cause was the violence of the mob who were attracted to the spot by the fire, and who but for the fire in all probability would not have acted as they did. The word "originating," which has been so much relied on, has in my opinion no greater effect than the word "consequences" was allowed to have in the case of *Ionides* v. *The Universal Marine Insurance Company* (1), in preventing the application of the maxim "Causa proxima non remota spectatur." So, as to the exception of "breakage during removal." Assuming that those words mean "during the time of removal," that is, the removal of the business or plant, any injury done or occasioned at that time by any person or from any cause, though it had nothing whatever to do with the removal, would be within the exception. That, however, would not be the ordinary grammatical meaning of the clause. It evidently means breakage during the time of removal, from some accident resulting from or incident to the removal. In that view, the injury on this occasion clearly did not arise from any of the excepted perils.

BYLES, J. I am of the same opinion. I think the damage in question was not caused by fire, and did not originate in fire; for, I agree with my Brother Willes that the introduction of the word "originating" in no degree varies the construction to be put upon the instrument. Fire, no doubt, was the remote cause of the damage,—the causa sine quâ non: it would not have happened if there had been no fire. The proximate and immediate cause was, the violence of an ungovernable mob, which resulted in burglary and shoplifting. Then, did the damage happen "during removal," within the meaning of the other part of the exception? I was at first under the impression that these words meant a removal in the sense of a change of tenancy. But, upon consideration, I think they refer to a removal of the glass from one part of the premises to another, or it may be from one set of premises to another. The policy, it is to be observed, is on plate-glass only: it is headed "Plate-Glass Policy:" and the glass must not be placed horizontally or be moveable. The subject-matter of insurance, therefore, is, fixed plate-glass placed vertically. If removed

(1) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

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and placed in a horizontal position, it is no longer insured. The exceptions are, breakage during removal, or during alteration, or during repair of premises; and they are evidently introduced by reason of the greater risk of breakage whilst these things are going on. For these reasons, I am of opinion that the damage did not happen during removal, so as to bring it within the exception in the policy.

KEATING, J. I am of the same opinion. The glass in question was broken by the act of the mob, who had been attracted to the spot by the fire on the adjoining premises. The fire was the mere accidental cause of the assembling of the mob. The breaking of the glass did not result immediately from that which caused the mob to assemble, but from the felonious act of the mob when assembled. In all policies, it is the proximate and immediate cause of loss which the law looks to, and not the remote cause. As to the meaning of the words "breakage during removal," I must confess I feel inclined to accept the view suggested by my brother Willes. What were the parties likely to except? Evidently such occurrences as were likely to take place whilst workmen were about, and the premises under repair; the risk of breakage under such circumstances being greatly enhanced. So also whilst the tenant was removing his furniture and stock for a change of premises. As to the sufficiency of the notice, I entirely agree with what has fallen from my Lord.

Rule discharged.

Attorneys for plaintiff: *Stevens & King.*
Attorneys for defendants: *Poole & Hughes.*

BECKETT *v.* THE MIDLAND RAILWAY COMPANY.

Jan. 17.

Railway Company — Compensation under s. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)—*Award including Matter in respect of which Claimant not entitled to Compensation.*

To an action against a railway company upon an award of an arbitrator, appointed to determine a claim under the Lands Clauses Consolidation Act, 1845, whereby the arbitrator found that the claimant had sustained damage by reason of his messuage being injuriously affected by the execution of the works men-

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tioned in and authorized by the company's special act, "to wit, by the erection of an embankment *and by the narrowing of the road* in front of the said messuage," to the amount of 80*l.*, which sum he directed the company to pay to the claimant,—the defendants pleaded (setting out the award, which recited the act of parliament and the agreement of reference) that the plaintiff's said messuage was not, nor was his interest therein, injuriously affected by the narrowing of the road, and that the sum awarded included money of uncertain amount which the arbitrator awarded for compensation for damage sustained by the plaintiff by reason of his messuage being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the road, by reason whereof the award was void:—

Held, on demurrer, a good plea.

DECLARATION, that, before and at the time of the making of the agreement thereinafter mentioned, the plaintiff was seised in fee of a messuage situate in and known as No. 30, Ampthill Street, in the borough of Bedford, and the defendants, a railway company incorporated by "An Act to consolidate the North Midland, Midland Counties, and Birmingham and Derby Junction railways" (7 Vict. c. xviii.), and by the Midland Railway (Additional Powers) Act, 1862 (25 & 26 Vict. c. lxxxi), were impowered to execute certain works in the last-mentioned act particularly mentioned and described: that the plaintiff being a party entitled to compensation in respect of his interest in the messuage above mentioned, which was injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), by the execution of the said works by the last mentioned act authorized to be executed, and for which injurious affecting the defendants, who were and are the parties impowered to execute and who did execute the said works, had not made satisfaction to the plaintiff under the provisions of the last mentioned act, or of either of the acts in the declaration first mentioned, or of any act incorporated therewith, and the compensation to which the plaintiff claimed to be entitled in respect of his interest in the said messuage exceeding the sum of 50*l.*, and the plaintiff, desiring to have the question of the said compensation settled by arbitration, gave notice in writing of such his desire to the defendants, stating in the said notice the nature of his interest in the said messuage, and the amount of compensation claimed by him in that behalf, and the defendants neither having paid the said sum so claimed, nor entered into any agreement to pay the same, it was thereupon

agreed by and between the plaintiff and defendants to refer the amount of compensation to be paid by the defendants to the plaintiff to the award of J. A.: that the said inquiry was thereupon duly had by and before the said arbitrator, who duly made and published his award in writing concerning the matters so referred to him, and thereby awarded and adjudged that the plaintiff had sustained damage by reason of his said messuage, No. 30, Ampthill Street, being injuriously affected by the execution of the said works mentioned in and authorized by the 14th section of the Midland Railway (Additional Powers) Act, 1862 (1), to wit, by the erection of an embankment *and* by the narrowing of the road in front of the said messuage, to the amount of 80*l.*, which sum the arbitrator thereby awarded and directed the defendants to pay to the plaintiff, and which sum was and is a much larger sum than was ever offered by the defendants to the plaintiff for and in respect of such compensation as aforesaid: and that the costs of the arbitration were settled at 38*l.* 6*s.* 3*d.*, of which the defendants had notice; but that they failed to pay either sum.

The second plea set out the award (in the terms of the declaration), and averred "that the plaintiff's said messuage was not, nor was his interest therein, injuriously affected by the narrowing of the said road in front of the said messuage; and that the said sum of 80*l.* included money, the amount of which was unknown to the defendants, which money the arbitrator awarded for compensation for damage sustained by the plaintiff by reason of his messuage being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the said road; by reason whereof the said supposed award was and is void."

Demurrer, assigning for cause "that the validity of the award set out in the plea cannot be questioned, except for an error apparent on the face thereof, and that the award set out in the plea is good on the face thereof." Joinder.

(1) The 14th section was as follows: "The company shall carry the Bedford, Ampthill, and Woburn turnpike-road across their Leicester and Hitchin Railway by means of a bridge, in lieu of the existing level crossing of that road, and for such purpose shall divert the said road in the manner and to the extent shewn on the deposited plans and sections relating thereto; and after the completion thereof shall stop up and discontinue such level crossing, and may appropriate the site thereof to the purposes of their undertaking."

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A. K. Stephenson, in support of the demurrer. If by the erection of the embankment and by the narrowing of the road the plaintiff's messuage can be in any way injuriously affected, within the meaning of the Lands Clauses Consolidation Act, the award is good: the amount awarded as compensation cannot be questioned. The point is completely set at rest by the judgment of Erle, C.J., in the Exchequer Chamber, in *Rickets* v. *The Metropolitan Railway Company.* (1) After referring to *Chamberlain* v. *The West End of London, &c., Railway Company* (2), his Lordship says: "The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstance of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street, either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected, both for pleasure and profit, by reason of the change in the access to and from the house; or, if a house fronting to a street of that description should be turned round so as to front to a dark back alley, the house would be injuriously affected,—the site of the house would be affected for the worse. In these cases here suggested, the house is supposed to be removed, to make the meaning more clear. But if, instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted or sunk or changed in its character, the relation of the house to its highway is affected to precisely the same degree as it would be by altering the relative position of the house itself in respect of that highway." If the arbitrator had jurisdiction, it is not competent to the defendant to split up his award, and plead as to a part of the sum awarded, that it was awarded in respect of something which is not an injurious affecting within the statute. The Court will not set aside an award for a mistake whether of law or fact not apparent upon the face of it. Here the award is perfectly good, unless it is assumed that the arbitrator adopted an erroneous

(1) 34 L. J. (Q. B.) 257.

(2) 2 B. & S. 605; 31 L. J. (Q.B.) 201; in error, 2 B. & S. 617; 32 L. J. (Q.B.) 173.

principle. In *Hodgkinson* v. *Fernie* (1), where a verdict was taken for the plaintiff, subject to the award of an arbitrator *as to the amount of damages*, and his award included an amount of damages which (it was assumed) the plaintiff was not legally entitled to in the action, this Court declined to interfere.

[ERLE, C.J. A statutory award under the Lands Clauses Consolidation Act stands upon a different footing from an ordinary award. If the claim here had been only for the narrowing of the road, and the arbitrator had awarded damages for that, could it have been contended that the company could not plead that there was no injurious affecting? And, if not, why should they be precluded because the arbitrator has mixed up that claim with another, and awarded a lump sum for damages in respect of both ?]

In *Read* v. *The Victoria Station and Pimlico Railway Company* (2), the award of damages was replied by way of estoppel. The narrowing of the road here must be assumed to have been such a narrowing as injuriously to affect the plaintiff's property.

[WILLES, J. I incline to think that this would be a good plea to an ordinary award. You could always plead, in an action upon the award, that there was a matter in difference submitted upon which the arbitrator has not awarded: *Mitchell* v. *Staveley* (3): or you might plead that the award, though apparently valid, was one which did not pursue the submission, or which exceeded it and included something which the arbitrator had no authority to entertain, and which could not be rejected. *Fisher* v. *Pimbley* (4) is a sufficient authority for that. This plea is in effect nothing more than that: it alleges that the arbitrator has awarded one sum as to A. and B.; that B. was not within his competency; and, as B. cannot be rejected, the award cannot be cured. Quod dubitas ne feceris. If the matter be doubtful, the Court cannot give judgment upon it.]

It is submitted that there is nothing upon the face of this

(1) 3 C. B. (N.S.) 189; 27 L. J. (C.P.) 66.

(2) 1 H. & C. 826; 32 L. J. (Ex.) 167: and see *Chapman* v. *Monmouthshire Railway Company*, 2 H. & N. 267; 27 L. J. (Ex.) 97.

(3) 16 East, 58.

(4) 11 East, 188.

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award to shew that the arbitrator has exceeded his jurisdiction, or that he had no power to award as he had done.

Field, Q.C. (*Macnamara* with him), contrà, was not called upon.

ERLE, C.J. I am of opinion that the defendants are entitled to judgment. This is a reference under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of a claim for an injurious affection of land by the execution of the works of a railway company. The claim being made, the company were bound either to comply with the demand, or to issue their warrant to summon a jury, or to appoint an arbitrator. Here the claimant and the company agreed to refer the amount of compensation to a single arbitrator. His award stands in pari jure with the verdict of a compensation jury. (1) Now, the verdict of a jury in such a case is no more than an assessment of the damages, provided the claimant has a right to compensation: and the company are entitled to traverse the facts which give the right to compensation. If the claim here had been confined to damages for narrowing the road, that rule of law would undoubtedly have authorized this plea. But the claim was not rested merely on the narrowing of the road: it was for that and also for the erection of an embankment in front of the claimant's messuage: and the arbitrator has expressly found that the claimant is entitled to compensation in respect of both matters, and has awarded a lump sum of 80*l.* in respect of both. The defendants contend that the messuage was not injuriously affected by the narrowing of the road, and that the award is bad, inasmuch as it assesses compensation for that. On the part of the plaintiff it is insisted that the award is good upon the face of it, and that the amount cannot be questioned: that is, since the demurrer admits that the messuage was not injuriously affected by the narrowing of the road, that the good part of the award (as to the compensation for injurious affection by the erection of the embankment) will carry through the bad. But if the arbitrator had awarded 40*l.* in respect of the one claim and

(1) See *Re Newbold and Metropolitan Railway Company*, 14 C. B. (N.S.) 405; and *Barber* v. *Nottingham Canal Company*, 15 C. B. (N. S.) 726; 33 L. J. (C. P.) 193.

40*l.* in respect of the other, the defendants would in my judgment have been clearly at liberty to traverse the fact that the plaintiff's messuage had been "injuriously affected" by the narrowing of the road; and it can make no difference that a lump sum is given in respect of both claims.

WILLES, J. I am of the same opinion. An analogous case upon an ordinary award would be a reference of a matter of claim, provided it was one which the claimant could enforce in a court of law,—a reference, in fact, of damages. As soon as the amount of damages was ascertained, the condition would come in force, and the question would arise whether the claimant was entitled to recover anything. So, if there were several claims, the reference (as to damages) would be a reference of the claims or such of them as were enforceable at law. After the amount had been ascertained, if it included something that was not legally enforceable, the condition would come into operation, and the award would be bad if any one of the claims was not enforceable, unless the damages were so assessed that the objectionable part could be severed from the rest. The construction which has been put upon the Lands Clauses Consolidation Act, first in the case of *Reg.* v. *London and North Western Railway Company* (1), and afterwards in a series of cases which have followed it, imposes upon the right of a claimant under s. 68 the condition I have imagined in reference to an ordinary award.

KEATING, J. I am of the same opinion. If Mr. Stephenson's argument were allowed to prevail, it would deprive the company of the means of getting rid of a claim in respect of which it is admitted upon this record that they are not liable, because the arbitrator has included in his award something in respect of which they are liable.

MONTAGUE SMITH, J., concurred.

Judgment for the defendants.

Attorneys for plaintiff: *Young, Maples & Co.*
Attorneys for defendants: *Hayes, Twisden, Parker & Co.*

(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.

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SHORT *v.* SIMPSON and Others.

Bill of Lading—Effect of Re-indorsement to the Consignor—Construction of the Bills of Lading Act, 18 & 19 *Vict. c.* 111.

Goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and, on his re-paying the sum advanced, the bill of lading was re-indorsed and delivered back to him:—

Held, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the ship-owners under the original contract; and consequently that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement.

Quære, whether one who takes a bill of lading by indorsement after a breach by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of the Bills of Lading Act, 18 & 19 Vict. c. 111?

The first count of the declaration stated, that the plaintiff at the request of the defendants caused to be delivered to the defendants, and they received from the plaintiff, certain goods of the plaintiff, to be by them on board a ship of the defendants' safely and securely carried by the defendants therein on a voyage, to wit, from the river Thames to Bombay, and there, to wit, at Bombay aforesaid, to be safely and securely delivered for the plaintiff, certain perils and casualties only excepted, for certain freight and reward to the defendants in that behalf; that the defendants were not prevented from carrying or delivering the said goods by any or either of the perils and casualties aforesaid; and that all conditions were fulfilled, &c.; yet that the defendants did not safely and securely carry and deliver the said goods as aforesaid, but the same by and through the carelessness, negligence, and improper conduct of the defendants in that behalf, became and were and are wholly lost to the plaintiff.

The third count stated, that, by a bill of lading made on the 3rd of September, 1863, by the defendants, and delivered to the plaintiff, the defendants promised the plaintiff that certain goods of the plaintiff in the said bill of lading mentioned, and then shipped on board the ship *Dorothy* in the port of London, should be delivered at Bombay, in India (certain perils and casualties

only excepted), to the plaintiff or his assigns, he or they paying freight for the same; that the plaintiff indorsed the bill to the Central Bank of Western India, to whom the property in the goods thereby passed, and they afterwards re-indorsed the bill of lading to the plaintiff, to whom the property in the goods passed; and that, although the delivery of the goods as aforesaid was not prevented by any of the perils or casualties aforesaid, and all conditions were performed, &c., to entitle the plaintiff to maintain the action for the breach thereinafter mentioned, yet that the said goods were not delivered by the defendants at Bombay according to their contract, but the same were delivered by the defendants to persons not entitled to have the same, and the same had been and were wholly lost.

Third plea, to the first count, that the goods were so delivered by the plaintiff to the defendants, and received by them after the 14th of August, 1855 (1), and that the same were so delivered and received under and subject to the terms of a bill of lading then signed for the same by the master of the ship in the first count mentioned, and that the agreement for the carriage and delivery of the same was contained wholly in the bill of lading and not otherwise; that the bill of lading was and is in the words and figures following [setting out the bill of lading, which described the goods as shipped on board the *Dorothy*, bound for Bombay, and made them deliverable "at the aforesaid port of Bombay (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto, excepted), unto order (freight to be paid in London, ship lost or not lost), or to assigns: Freight for the said goods——, with primage and average accustomed"]; that, after the shipment of the said goods, and before the arrival of the ship at Bombay, the plaintiff indorsed the bill of lading to certain persons to the defendants unknown, in order to pass the property in the goods to such persons; and that thereupon, and by reason of such indorsement, the property in the goods mentioned in the first count passed to the said persons; and that they were the holders of the

(1) The day when the Bills of Lading Act, 18 & 19 Vict. c. 111, came into operation.

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bill of lading at the time of the committing of the grievances in the first count mentioned; and that the persons entitled to receive the goods were and are the parties entitled to sue the defendants in respect of the grievances mentioned in the first count.

Tenth plea, to the third count, that the bill of lading was made after the 14th of August, 1855; that the indorsement thereof by the Central Bank of Western India to the plaintiff was first made after the alleged default of the defendants, and not otherwise; and that, at the time of the alleged default, the said bank were the holders of the bill of lading, and the persons entitled to receive the goods and to sue the defendants in respect of such alleged default. (1)

The defendants also demurred to the third count, the ground of demurrer assigned being, "that the count does not shew that the bill of lading was re-indorsed before the time for delivering the goods had elapsed." Joinder.

Second replication to the third plea, that, whilst the persons to whom the plaintiff indorsed the bill of lading as therein mentioned were the holders of the bill of lading, the defendants did not at any time deliver to the said persons, nor did the said persons at any time during such period, or at all, have delivery of the goods from the defendants, who had altogether made default in performing their duty and the terms of the bailment in the declaration mentioned, to wit, by delivering the goods to persons not entitled to receive the same, to wit, to persons other than the persons in the third plea mentioned, and other than the plaintiff; that the bill of lading was indorsed by the plaintiff as in the said plea mentioned in blank, and not otherwise, and delivered to the said indorsees thereof by the plaintiff so indorsed in blank, which was the indorsement in the third plea mentioned; and that, after such indorsement, and before suit, and whilst the said indorsees thereof in the plea mentioned were the lawful holders thereof, they, with

(1) This was an added plea, and was dated of the day on which it was pleaded, and placed in the demurrer-books after the replication to the former plea. In the course of the argument, *Willes, J.*, observed that this was incorrect, and that added pleas should be dated as of the day on which the original pleas were pleaded.

the intent to pass and re-vest the property in the goods to and in the plaintiff, thereby re-delivered the bill of lading so indorsed in blank to the plaintiff with such intent as aforesaid, and so as to pass and re-vest, and they did thereby pass and re-vest the property and all rights of action in respect of the goods to and in the plaintiff; that the said indorsement of the said bill of lading to the persons in the plea mentioned was not made with intent to pass, and did not as between the plaintiff and the said indorsees pass the absolute property in and an indefeasible right to the goods to the said persons, but with intent to give them, and in pursuance of an agreement between them and the plaintiff to give them, a right in the nature of a pledge upon and in respect of the goods, by way of further assurance, to secure moneys advanced and paid by them to the plaintiff; and that, before and at the time of the re-delivery of the bill of lading to the plaintiff, the said moneys had been re-paid to the said persons, and all claims of theirs upon or in respect of the goods had been and were satisfied.

The plaintiff also demurred to the tenth plea, assigning for cause "that the rights of action passed to the plaintiff with the property on re-indorsement of the bill of lading, even though the alleged wrong may have occurred before the re-indorsement to the plaintiff." Joinder.

Rejoinder to the second replication to the third plea, that the said indorsees in the replication mentioned first re-delivered the bill of lading, so indorsed in blank as therein mentioned, to the plaintiff after the alleged default of the defendants in the said replication mentioned, and not otherwise; and that, at the time of the alleged default, the indorsees were the holders of the bill of lading, and the parties entitled to receive the goods, and to sue for the non-delivery thereof.

The defendants also demurred to the same replication, assigning for causes "that the replication is bad for not averring a re-delivery before default, and that it is a departure from the declation." (1) Joinder.

There was also a demurrer to the rejoinder, assigning for cause "that, whensoever the default of the defendants was made, the right to sue in respect thereof is now in the plaintiff." Joinder.

(1) This was abandoned on the argument.

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Dowdeswell (*Bovill, Q.C.*, with him), for the plaintiff. Two substantial questions are raised by these demurrers,—first, whether, by force of the Bills of Lading Act, 18 & 19 Vict. c. 111, the indorsement of a bill of lading carries with it a right of action already accrued; secondly, whether the original consignor of the goods, who has indorsed the bill of lading by way of pledge for an advance of money, is, on its re-indorsement to him, remitted to his original rights as consignor. Formerly, the bill of lading not being negotiable like a bill of exchange, the indorsee could not maintain an action upon it in his own name for non-delivery of the goods at the port of delivery; the effect of the indorsement being only to transfer the right of property, but not the contract itself: *Thompson* v. *Dominy* (1); *Howard* v. *Shepherd*. (2) That being felt to be an inconvenience, the Bills of Lading Act, 18 & 19 Vict. c. 111, was passed for the purpose of remedying it. The act recites, that, "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." It was evidently, therefore, the intention of the legislature that all the rights of the shipper should for the future pass by the indorsement to the assignee of the bill of lading, as well as the property in the goods. The enacting clause (s. 1) is, that "every consignee of goods named in a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." It is difficult to conceive language more clearly adapted to the carrying out the intention expressed in the preamble. And there can be no reason why a vested right of action should not pass as well as a future right. The answer set up on the other side, is, that, at the time the cause of action accrued, the plaintiff was not the owner of the goods.

[WILLES, J. The act of parliament would be useless, unless

(1) 14 M. & W. 403. (2) 9 C. B. 297; 19 L. J. (C.P.) 249.

the construction which the plaintiff contends for is the right one.]

The object was, to make bills of lading transferable by indorsement with the same facility as bills of exchange.

[WILLES, J. And not like leases, under the 32 Hen. 8, c. 34.]

Just so. At common law (or by the custom of merchants), the indorsement of a promissory note did not pass the right to sue: but the statute 3 & 4 Anne, c. 9, put promissory notes upon the same footing in this respect as bills of exchange, and vested a right of action thereon in the indorsee.

[MONTAGUE SMITH, J. According to the plaintiff's construction of the Bills of Lading Act, each successive assignee would be entitled to sue as if he had been the original consignor.]

The inconvenience of a contrary construction would be extreme: it might give rise to a multiplicity of actions upon every bill of lading.

Sir G. Honyman, contrà. If it were material so to do, it would be contended that the indorsement of a bill of lading, like the assignment of a lease, gives only a right to the consignee or assignee to sue in respect of future and not of past breaches. But that question does not arise here; for, it is admitted upon the record that the plaintiff indorsed the bill of lading to third persons, and so parted with all his rights in respect of the goods, and that at the time of the re-indorsement to him the voyage had been completed and the goods delivered at Bombay. Under these circumstances, neither property in the goods nor right of action in respect thereof could pass by the indorsement to the plaintiff. After the arrival of the ship and the delivery of the goods to some one else, so that a complete right of action had accrued to the then holders of the bill of lading, the mere writing something on the paper could not pass the property back to the plaintiff. Suppose the goods were landed here, and the holder of the bill of lading got possession of the dock-warrants without delivering up the bill of lading, and he afterwards raised money upon the bill of lading, in what position would the assignee stand?

[WILLES, J. It may be that the bill of lading would be exhausted by the delivery of the goods at the dock as the warehouse of the consignee.]

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The effect of the indorsement of a bill of lading is much considered in *Lickbarrow* v. *Mason*. (1) In *Wright* v. *Campbell* (2), an indorsement of the bill of lading, after a bonâ fide sale of the goods afloat, was held to operate nothing. If the indorsement of the bill of lading does not transfer the property in the goods, the statute does not transfer the right of action. Here, there would have been no difficulty in maintaining the action in the name of the bank.

[WILLES, J. Is not that argument contrary to the principle of law, that a man who wrongfully parts with goods is liable as if he had them still in his possession ?]

The indorsement of the bill of lading after the voyage had ended, and when it had ceased to be the symbol of title to the goods, could no more operate to transfer the property in the goods or the right of action, than an indorsement after a loss. The indorsement of the bill of lading can only be available whilst the goods are in itinere. Any other construction would only have the effect of enabling the parties to transfer a right to bring an action of trover.

Dowdeswell, in reply. There is no ground for saying that the voyage had terminated at the time of the re-indorsement of the bill of lading to the plaintiff. The third count alleges, and the replication to the plea to the first count still more strongly, that the indorsement of the bill of lading by the bank re-vested the property in the goods and all rights under the bill of lading in the plaintiff. It may be that the defendants had wrongfully delivered the goods to some third person during the voyage; but that would not divest the plaintiff's property in the goods: *Jones* v. *Dowle*. (3) It may be conceded that, after the goods have been landed and delivered to the consignee at the port of delivery, the bill of lading is exhausted, and possibly a subsequent indorsement of it would pass no right. But nothing of the kind appears upon this record. The goods might have been landed at the Cape of Good Hope.

ERLE, C.J. I am of opinion that our judgment upon these

(1) 2 T. R. 63; 6 East, 21; 1 H. Bl. 357; and see 1 Smith's L. C. 5th edit. 681.
(2) 1 W. Bl. 628; 4 Burr. 2046.
(3) 9 M. & W. 19.

demurrers should be for the plaintiff. Goods were delivered to the defendants to be carried to Bombay under a bill of lading. The plaintiff, the consignor, indorsed the bill of lading in blank, and deposited it with certain bankers for an advance of money; and so there was a good indorsement whilst the bill of lading was outstanding. Subsequently, the advance being repaid, the bankers re-delivered the bill of lading to the plaintiff, the original consignor. I think the strongest way of putting it for the plaintiff, is, to say that, without the aid of the Bills of Lading Act, he was by that re-delivery remitted to all the rights which he had under the original contract. But, where there has been an indorsement of the bill of lading in blank, and a re-indorsement, I should be inclined to say that whoever took the bill of lading would take it as indorsee, and might sustain a claim upon it under the statute. The defendants have not fulfilled their contract by the wrongful delivery of the goods to a third person.

WILLES, J. I am of the same opinion. I think the true construction of the statute, is, that all the rights of the consignor under the contract contained in the bill of lading may be passed by indorsement and are enforceable by the indorsee so long as the bill of lading is in force. When the advance made to him by the bank was paid off, the consignor was remitted to his original rights, whether under the statute or at common law. The defendants' position cannot be bettered by a wrongful delivery.

KEATING, J. I am of the same opinion. By the re-indorsement, the plaintiff was remitted to his original rights under the bill of lading. A wrongful delivery of the goods is no delivery.

MONTAGUE SMITH, J. I am of the same opinion. Whether the plaintiff is considered as being remitted to his original rights on re-paying the advance, or as an indorsee of the bill of lading, seems to me to be the same thing. I think all the rights under the contract were intended by the act to slide from one assignee to another. If the goods had been delivered in fulfilment of the bill of lading, a very different question might have arisen. But, there having been no delivery according to contract, I do not see why the bill of lading should not be assignable, and why all the common law consequences should not attach.

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Sir G. Honyman prayed leave to amend his plea by adding an averment of a delivery of the goods at Bombay; and *Dowdeswell* prayed leave to add a count for the loss of the plaintiff's reversionary interest in the goods.

PER CURIAM. The averment of a delivery at Bombay can make no difference; but the defendant must give up the objection on the ground of departure. As to the plaintiff's reversionary interest, that has not been injured: but, if necessary, he may apply at chambers for leave to add a count.

Judgment for the plaintiff on all the demurrers; subject to amendment, as suggested.

Attorneys for plaintiff: *T., D., & T. Harrison.*
Attorneys for defendants: *Waltons & Bubb.*

Jan. 31.

DAVIS *v.* PERCY.

Bankrupt—Private Arrangement Act, 7 & 8 *Vict. c.* 70—*Effect of Certificate under s.* 6.

A certificate, under the 6th section of the 7 & 8 Vict. c. 70, of the filing of the resolution of the creditors agreeing to a composition, with the commissioner's protection indorsed thereon, does not operate to protect the debtor's goods from seizure under a fi. fa. upon a judgment obtained before the date of the petition.

THE plaintiff sued the defendant for goods sold and delivered, and on the 13th of January, 1865, signed judgment against her for 94*l.* 3*s.* 10*d.*, debt and costs.

On the 22nd of March, 1865, the defendant presented a petition to the court of bankruptcy under the Private Arrangement Act, 7 & 8 Vict. c. 70, with the concurrence of one third in number and value of her creditors, with a schedule shewing that there were six creditors the aggregate amount of whose debts was 322*l.* 8*s.* 10*d.*, and that the concurring creditors were two, whose debts amounted together to 182*l.* 10*s.*, and by which petition she proposed to pay her creditors a composition of 2*s.* 6*d.* in the pound, within seven days after the confirmation of that proposal or any modification thereof by the commissioner. The first meeting under the

petition was held on the 11th of April, 1865, when the proposal was agreed to by the major part in number and value of the creditors, and a second meeting appointed for the 2nd of May. At the second meeting the resolutions assented to at the first meeting were ratified and confirmed by three fifths in number and value of the creditors, and a trustee was duly appointed to receive and distribute the composition. On the 10th of May the commissioner acting in the matter of the petition granted the defendant *a protection from arrest* until the 10th of May, 1866, pursuant to the 5th and 6th sections of the statute; and on the same day the defendant paid into the hands of the trustee a sum sufficient to pay the amount of the composition to all the creditors, and such composition was afterwards paid to all except the plaintiff. It was duly tendered to him, but he declined to accept it; and, on the 10th instant, he issued a fi. fa., under which the defendant's goods were seized.

Application was afterwards made to Byles, J., at chambers, to set aside the fi. fa. The learned judge ordered the defendant to pay 50*l.* into court as the value of the goods, and desired that the motion should be made here.

Campbell Foster now moved to set aside the execution, on the ground that the commissioner's certificate protected the defendant's goods as well as her person from process. The question mainly turns upon the 5th and 6th sections of the statute. The 5th section enacts, "that, if at the second meeting three fifths in number and value of the creditors present, or nine tenths in value, or nine tenths in number whose debts exceed 20*l.*, shall agree to accept such arrangement or composition as was assented to at the first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to such confirmation as is hereinafter enacted) shall thenceforth be binding and of full force, as well against the said petitioning debtor as against all persons who were creditors of the said petitioning debtor at the date of his said petition, and who had notice of the said several meetings of creditors; provided, however, that such resolution or agreement shall not be valid unless one full third in number and value of all the creditors of such petitioning

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debtor were present at such second meeting, either in person or by an authorized agent." And the 6th section enacts, "that, within fifteen days next after the passing of such resolution or agreement, the same shall be submitted to the commissioner acting in the matter of the said petition, who, if he shall think the same reasonable, and proper to be executed under the direction of the said Court, shall cause the same to be filed and entered of record therein, and shall grant to the said petitioning debtor a certificate of such filing, and shall from time to time indorse on such certificate his protection of such petitioning debtor from arrest: and such petitioning debtor shall be free from arrest at the suit of any person being a creditor at the date of his said petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioning debtor at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioning debtor, shall be liable to such penalty as is provided respecting bankrupts in the like case by the statutes now in force concerning bankrupts." The ground upon which the learned judge proceeded at chambers was, that there had been no final certificate under s. 13. (1) But the time for applying for that certificate had not yet arrived. The cases of *Temple* v. *Sleigh* (2) and *Blackford* v. *Hill* (3), so far as they go, seem to be adverse to the defendant: but in neither of them was the point expressly decided. In *Temple* v. *Sleigh* (2) it was thrown out by Wilde, C.J., that a plea setting up a certificate under s. 6 was no answer to the action; and the defendant's counsel elected to amend. And in *Blackford* v. *Hill* (3) it seems to have been held that a similar plea was bad.

(1) Which enacts that "at such last-mentioned meeting" (viz. a meeting to be called by the commissioner after the resolution shall have been carried into effect and all the creditors satisfied), "the commissioner shall give to the petitioning debtor a certificate, under the hand and seal of the said commissioner, of the filing of the said petition and of the resolution or agreement of the creditors of the said petitioning debtor, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under the statutes relating to bankrupts, excepting only that no debt herein excepted from the operation of this act shall be barred by the said certificate."

(2) 9 C. B. 348.

(3) 15 Q. B. 116; 19 L. J. (Q.B.) 346.

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M. Williams, who was to have shewn cause in the first instance, was not called upon.

ERLE, C.J. If there had been no authority upon the subject, I should have had no hesitation in holding the construction of the statute to be adverse to this application. The legislature has provided by s. 6, that, when certain steps have been taken by the debtor, he shall be entitled to a certificate protecting his person from arrest; and that, when certain other steps have been taken, he shall have a certificate which will enure as a certificate in bankruptcy. Until these latter steps have been taken, the protection is confined to the person of the debtor. But *Blackford* v. *Hill* (1) is decisive. As Lord Campbell says, "there is no bar till the case is brought within s. 12."

KEATING, J., concurred.

MONTAGUE SMITH, J. The provisions of the statute seem to be somewhat imperfect. The 5th and 6th sections hardly carry out the intention of the legislature.

Rule refused.

Attorney for plaintiff: *G. E. Mead.*
Attorney for defendant: *I. Stuart.*

THE EARL OF LISBURNE *v.* DAVID DAVIES.

Jan. 25.

Landlord and tenant—Incroachments by tenant on waste—Presumption that they are made for the benefit of his landlord—What sufficient contiguity or proximity —Intervention of a river.

To raise the presumption that an incroachment on waste land by a tenant was made for the benefit of his landlord, it is not necessary that the land incroached should be contiguous or adjoining to, in the sense of conterminous with, the land held by him as tenant; it is enough if it be so near thereto that it may be presumed that his position as tenant enabled him to approve.

Nor does the circumstance of the intervention of a small river and a fence and a narrow strip of waste between the holding and the incroachment rebut the primâ facie presumption, though there be no direct access between the two across the stream.

About forty years ago A., a labourer, in the course of three years completed the inclosure of four acres of waste land of the manor of P., separated only by a small

(1) 15 Q. B. 116; 19 L. J. (Q.B.) 346.

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river and a narrow strip of the waste from a farm held by B. under the lord; and, when the inclosure was completed, B. paid A. 4*l.* 10*s.*, and took possession of the four acres, and occupied them with the farm. At the expiration of his term, B. claimed to be entitled to the fee-simple of the four acres; and, in ejectment by the lord, who claimed them as an incroachment by his tenant for his benefit, a verdict was taken for the plaintiff, the whole matter being reserved for the consideration of the Court, who were to draw inferences of fact:—

The Court drew the inference that the incroachment was made by A. as the servant of B; and held that there was nothing in the relative position of the inclosure and the farm to rebut the presumption that B. held the inclosure as part of the farm.

EJECTMENT for a field called Caenewydd, otherwise Cae-Rhos, part of a farm called Bryneithinog, in the parish of Caron, in the county of Cardigan, containing about four acres.

The cause was tried before Shee, J., at the last summer assizes at Cardigan. The facts were as follows:—The defendant and his father had for many years occupied the farm called Bryneithinog as tenants under the plaintiff and his predecessors, Earls of Lisburne, which farm was bounded on one side by a small river called the Flur. Cae-Rhos, the field in question, was part of a common called Rhosgelly Gool, on the opposite side of the stream, and separated from the farm Bryneithinog by a small strip of land and a mountain fence. About forty years ago Cae-Rhos was partially inclosed by one John Davies (a labourer), a cousin of the defendant; and, when the inclosure was completed (in about three years), John Davies relinquished possession of it to the defendant for the sum of 4*l.* 10*s.*, and the defendant had continued to occupy it ever since.

The defendant's own account of the transaction was in substance this:—"John Davies inclosed Cae-Rhos. He was a relation of mine: he was a labourer. After the inclosure of Cae-Rhos, I had it very soon. He held it for the first three years, but he had not finished it quite until the expiration of the three years. I got it then. I settled with him for his right. I gave him 4*l.* 10*s.* for it. After that I held it." On cross-examination, he added, "I took it from him perhaps a week after it was finished. I then paid him 2*l.*, and the remainder afterwards." No conveyance was put in; nor was there any evidence of the value of the land.

Rhosgelly Gool was part of the waste of the manor of Penarth, of which the plaintiff was lord. The Flur was at times a deep

stream; but sometimes so shallow that a child could walk across; at no time, however, could carts go from Bryneithinog to Cae-Rhos without passing over a bridge at a little distance, and then through inclosures belonging to other persons.

The plaintiff's claim to the field called Cae-Rhos was founded upon the general presumption that a tenant inclosing land by incroachment adjoining to his farm, in the absence of evidence to the contrary, is taken to have inclosed it for the benefit of his landlord, or, in other words, that it became part of the holding.

For the defendant it was submitted that that presumption was rebutted by the fact of the inclosure having been made by a third person, and of the land so inclosed not being *immediately* contiguous or adjacent to the farm which he held under the plaintiff.

Under the direction of the learned judge, a verdict was taken for the plaintiff, the whole matter being reserved for the consideration of the Court, who were to have power to draw inferences of fact.

T. Allen, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground "that the evidence shewed that the piece of land inclosed from the waste was not approved for the landlord's estate, and was not part of it."

H. S. Giffard, Q.C., H. G. Allen, and *J. W. Bowen*, shewed cause. The defendant clearly held Cae-Rhos together with Bryneithinog: and the intervention of the stream and the narrow strip of land did not prevent the contiguity of holding which precludes the tenant from asserting that he inclosed for himself and not for his landlord. Doubts have sometimes arisen where the lord of the manor from whose waste the land is taken is a different person from the lessor or landlord: but none can arise where, as here, the landlord and the lord of the manor are one and the same person. In *Doe* d. *Lewis* v. *Rees* (1), where land had been incroached from the sea-coast by the defendant whilst tenant to the lessor of the plaintiff, Parke, B., says: "It is clearly settled that incroachments made by a tenant are for the benefit of his landlord, unless it appears clearly by some act done at the time of the making of the incroachments, that the tenant intended the incroachments for his own benefit, and not to hold them as he held the farm to

(1) 6 C. & P. 610.

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which the incroachments were adjacent." And in *Doe* d. *Lloyd* v. *Jones* (1), where a lessee for lives of a farm inclosed from an adjoining extra-parochial waste, on which there was a right of common in respect of his farm, some small pieces of land near *but not actually contiguous to* the farm, it was held, that, in the absence of evidence shewing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of the lessor (who was not the lord of the waste), to belong to him as part of the farm at the determination of the lease; and that this presumption was not rebutted by a secret conveyance by the tenant to his son, not accompanied by possession. In *Andrews* v. *Hailes* (2), a tenant incroached on waste land, not belonging to his landlord, separated from his holding only by a road, and continued to occupy it as part of his holding for more than twenty years. He then gave up the original holding to his landlord, but claimed to retain the incroachment as his own. In ejectment by the landlord, it was held that, as between landlord and tenant, the incroachment thus made must be presumed to be a part of the holding, and that the intervention of the road did not rebut the primâ facie presumption. Lord Campbell there says: "I do not adopt the doctrine that the tenant steals for his landlord, and that therefore the landlord at the end of the demise is entitled to claim the stolen property: but I think that, when the property is taken and used as part of the holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises. The strange doctrine as to stealing for the benefit of the landlord originated in those cases where the landlord was lord of the manor, and the tenant incroached upon the waste. In such cases it might well be presumed that the tenant approved for the benefit of the lord, who had a right to approve: but the idea that he could steal the land of another for his landlord is as revolting to me as it was to my predecessor Lord Kenyon. (3) In the present case it appears that the defendant got possession of the incroachment by virtue of being tenant of the demised premises, and that he occupied it as part of the demised premises. They

(1) 15 M. & W. 580.
(2) 2 E. & B. 349; 22 L. J. (Q.B.) 409.
(3) In *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460.

were adjoining; for, there was nothing intervening but the road." Here, there was nothing intervening but the stream and a small strip of waste which belonged to the plaintiff as lord of the manor. *Kingsmill* v. *Millard* (1) carries the doctrine even further. Parke, B., there says: "It is laid down in all the cases,—whether the inclosed land is part of the waste or belongs to the landlord or a third person,—that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. I am disposed to discard the definition that the incroachment is made 'for the benefit of the landlord,' and to adopt that of Lord Campbell, viz. that the incroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises: *the same rule prevails where the incroachment is at a distance.* That is now the law." It is impossible to distinguish those cases from the present.

T. Allen, in support of the rule. All the cases turn upon the question what was the intention of the approver,—did he when he made the incroachment intend to approve for the benefit of his landlord? In considering this, contiguity has never been disregarded. In *Kingsmill* v. *Millard* (1), the land was contiguous to the holding; and none of the cases warrant the position of Parke, B., that "it is not necessary that the land inclosed should be adjacent to the demised premises." The learned Baron was not speaking merely of his own individual opinion. He says, "That is now the law." He was evidently misled by the marginal notes of the two cases of *Doe* d. *Lloyd* v. *Jones* (2) and *Andrews* v. *Hailes* (3), which are not sustained by the facts; for, in both, the land inclosed was contiguous to the subject of the demise. There was nothing but a road between them. Here, Cae-Rhos can in no sense be said to be adjacent or contiguous to Bryneithinog. The farm came down to the margin of the Flur: but, on the other side, between the stream and Cae-Rhos there was a strip of land and a hedge. There was no communication between the farm and the incroachment. To get from the one to the other, it was necessary

(1) 11 Ex. 313.
(2) 15 M. & W. 580.
(3) 2 E. & B. 349; 22 L. J. (Q.B.) 409.

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to pass through land belonging to other persons. It was proved that carts could not at any time cross the river.

[WILLES, J. What is contiguous or adjacent? This is not a presumption of law. It must have some relation to nearness or distance. The true criterion probably is, whether the fact of the person being tenant enables him to acquire the adjoining land.]

"Adjacent," according to the best definitions, means "touching."

[ERLE, C.J. Webster is very impartial. "Adjacent," he defines to be "lying near, close, or contiguous; bordering upon; as, a field adjacent to the highway." "Contiguous," he describes as "touching; meeting or joining at the surface or border; as, two contiguous bodies or countries:" and "Contiguity," as "without intervening space."]

In no case has the incroachment been held to have been made for the benefit of the landlord where it has been separated from the demised premises by more than a road, and therefore contiguity or adjacency is an important element in the consideration of whether or not the tenant intended to approve for his landlord's benefit. In *Doe* d. *Colclough* v. *Mulliner* (1), Lord Kenyon "revolted at the idea that the tenant could make the landlord a trespasser:" and he laid it down as clear law, "that, if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord."

ERLE, C.J. Performing the duties of a juryman, and drawing inferences of fact from the evidence, I have come to the conclusion that this rule ought to be discharged. I take it that Bryneithinog, the farm lately occupied by the defendant, the bed of the river, and Cae-Rhos, all were within the manor of Penarth, of which Lord Lisburne was lord, and presumably all were the lands of Lord Lisburne. I take it also that Cae-Rhos, if it had been inclosed by the defendant, is sufficiently near to the boundary of his farm to fall within the decisions which have been referred to, and which have laid it down as clear law, that a tenant inclosing waste land contiguous or adjoining to land which he holds of another, does not thereby acquire an absolute title to the fee, but is pre-

(1) 1 Esp. 460.

sumed to do so for the benefit of his landlord, so that it should go at the end of the term to the landlord as part of the holding. I think the distance here is not great enough to found a distinction. In some of the cases, the intervention of a road has been held to be immaterial. A small river intervenes here between the farm and the inclosed piece of land. But all depends upon the nature of the river. The intervention of a stream like the Rhine or the Rhone would probably rebut the primâ facie presumption, when a small insignificant stream would not. From the tenor of the authorities, I should presume that the main difficulty here arose upon the question whether David Davies, the tenant of Bryneithinog made this inclosure; because, if it had been inclosed by a stranger, and that stranger, having primâ facie a property in it, sold it to the tenant, in all probability I could not give the judgment I am now giving,—though I do not wish to be understood as binding myself by any expression of opinion upon the subject. But that was matter of evidence. It appears that the person who about forty years ago actually made the inclosure by putting a fence round it was one John Davies, a labourer, a cousin of the defendant; that he was about three years getting round it; and that the defendant then gave John Davies 4*l.* 10*s.*, and took possession of the inclosed piece, and has retained it ever since. The inference which I draw from the evidence is, that the hedger and ditcher, John Davies, was not making the inclosure for himself, but in the character of a labourer employed by the defendant. No one but the defendant was ever shewn to have occupied Cae-Rhos. I think the verdict was properly entered for the plaintiff.

WILLES, J. I am of the same opinion. The only part of the argument for the defendant which at all pressed on my mind is that to which my Lord has last adverted,—whether the defendant came in as upon a purchase of the incroachment from John Davies, so as to take the case out of the ordinary presumption that the person inclosing does so for the benefit of his landlord, so as to make the incroachment a part of his holding, and not for himself as upon an adverse claim. That is a presumption of fact, which is open to be rebutted. It is a point which is entitled to grave consideration; but, in order to found it, it is necessary for the defendant to establish that John Davies made the incroach-

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ment for himself. That depends upon the evidence of the defendant himself that he paid John Davies for "his right" 4*l.* 10*s.* The only weight I can attach to that statement is, that the 4*l.* 10*s.* was paid, not for the land, but for John Davies's labour in making the inclosure. I am led to that conclusion by two facts,—first, that no writing was produced,—secondly, that the incroachment consisted of four acres, and 4*l.* 10*s.* would seem to be more like a sum to be paid for the labour of inclosing than as the price of the fee-simple. My opinion therefore is, that the first proposition necessary to sustain Mr. T. Allen's argument is unfounded in point of fact. I am very unwilling to assume the functions of a juryman. But it would be no mercy to the defendant to grant him a new trial, merely that he might have the same justice measured out to him by a jury; for, unquestionably a verdict found for him upon such evidence would be set aside by the Court. The other part of the defendant's argument may be put thus. As the land inclosed is not contiguous, in the sense of being conterminous with his holding, the general presumption ought not to apply. No doubt, an incroachment may be at such a distance that it can in no sense be said to be connected with the occupation of the land under the landlord. If the land incroached belonged to the same landlord, the presumption *might* not apply. It would apply or not according as it might appear that the land was so near to the holding that by reason of that proximity the tenant gained the opportunity of annexing it, and the fact that the circumstances of the enjoyment might induce the landlord to wink at the incroachment. But here, there being nothing but the river and a strip of waste interposed between the defendant's farm and the inclosure, there is nothing to remove the land to such a distance as to make that circumstance weigh against the ordinary presumption. The history of the law upon this subject may be gleaned with tolerable accuracy from the cases which have been referred to. The general doctrine appears to be of considerable antiquity; and it seems never to have been questioned, except in the case before Lord Kenyon, of *Doe* d. *Colclough* v. *Mulliner*. (1) His lordship there thought it somewhat unnatural, because, if the tenant could be said to make

(1) 1 Esp. 460.

the incroachment for the benefit of his landlord, it would be making the landlord a trespasser, where the land incroached was the property of a stranger. It is unnecessary to say that I entertain the greatest reverence and respect for that learned judge: I merely refer to that case for the purpose of introducing a case which occurred at the same assizes before Mr. Baron Thomson, where this very question arose, viz. whether the incroachment and the land to which it was said to have been annexed must be conterminous. That was a case of *Doe* d. *Challnor* v. *Davies*. (1) It was an action of ejectment for two pieces of land, part of a common in Salop, which had been inclosed by the defendant and another, who occupied a farm of the plaintiff's contiguous to the common on which the incroachments had been made. The facts were, that, in 1721, Challnor's farm was let to Davies for a term of years, subject to lives; that, soon after the making of the lease, the tenant then in possession took a patch of land belonging to the common immediately contiguous to the farm; that there was no communication between the farm and the inclosure, but the gate from the inclosure led from the waste; and that about the year 1755 the then tenant made another incroachment on the common, by inclosing another piece of common adjoining the first incroachment, but not communicating with the farm. That was a case, therefore, of an incroachment not conterminous or adjacent to the land held. The common was contiguous, but not the inclosure. It was contended on the part of the plaintiff that the incroachments must be taken to have been made for his benefit. The learned Baron (having probably conferred with Lord Kenyon) intimated a strong opinion against the plaintiff; but, being referred to the opinions of three learned judges, amongst whom were those two great luminaries of the law, Mr. Justice Heath and Mr. Justice Buller, to the effect that incroachments by a tenant were taken to be for the benefit of his landlord, he, in deference to those learned persons, declined to nonsuit, and the plaintiff had a verdict. (2) The doctrine enunciated by Lord Wensleydale in

(1) 1 Esp. 461.

(2) This case and *Doe* d. *Colclough* v. *Mulliner* appear to have been communicated to the reporter by Mr. Jervis. See 1 Esp. 458, n.

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Kingsmill v *Millard* (1), therefore, is far from being novel. It is not necessary that the incroachment should be conterminous with the holding. It is enough if it is so near that by reason of its nearness the tenant gained the opportunity of making it, and the landlord might have tacitly acquiesced in it.

KEATING, J. The only real question was one of fact, viz. whether Cae-Rhos was inclosed by the defendant, or whether it was inclosed by a stranger and afterwards sold to the defendant. For the reasons pointed out by my Lord and my Brother Willes, I come to the conclusion that, though the inclosure was made by the hand of John Davies, it was made for the defendant, who paid him the price of his labour for doing it. That is the best judgment I can come to from the facts proved. But I cannot conceal from myself the fact that a jury from the spot would have been better able to form a right judgment on the facts than I am, having regard to their greater familiarity with the price of labour and the value of land in the neighbourhood. I would, however, observe that if there had been a purchase of the land by the defendant from John Davies, it is inconceivable that there should not be some writing to evidence the transaction. As to the question of law, if the incroachment was made by the defendant, I entirely agree with the opinions of my Lord and my Brother Williams.

MONTAGUE SMITH, J. I entirely agree in the conclusion of fact which has been arrived at by the rest of the Court. Mr. T. Allen says that to bring the case within the presumption upon which the plaintiff's claim rests, the incroachment must be contiguous in the sense of being immediately adjacent to or communicating with the land held of the landlord. I think the law is not so. Distance may be an element in forming the presumption, but is not, perhaps, the most important one. In many cases the question does not depend upon the relative distance, but upon the whole of the circumstances under which the incroachment is made. In that way only can the element of distance form a material ingredient.

Rule discharged.

Attorney for plaintiff: *E. Bolden.*
Attorney for defendant: *Thomas Clark.*

(1) 11 Ex. 313.

IN THE MATTER OF THE ARBITRATIONS BETWEEN THE WANSBECK RAILWAY COMPANY AND TROWSDALE AND OTHERS.

1866
Jan. 31.

Contract, Construction of—Agreement for Reference—Appointment of Arbitrator—Railway Amalgamation.

A contract between the W. Railway Company and certain contractors for works upon the line contained a stipulation that any difference arising thereon should be referred to T., "if and so long as he should continue to be the company's principal engineer." After the making of the contract the W. Railway Company became merged in and amalgamated with the N. B. Railway Company, under an act of parliament, which provided that, notwithstanding the amalgamation, and the partial repeal of the special act of the W. Railway Company, all contracts should be proceeded with and enforced as if such repeal had not taken place, the N. B. Railway Company being in all respects with reference to such matters substituted for the W. Railway Company:—

Held, that T., who still continued to be the engineer of the W. portion of the railway, but was not the "principal engineer" of the amalgamated company, was the proper referee in cases of disputes arising out of the above contract.

IN 1859, the Wansbeck Railway Company was incorporated under the 22 & 23 Vict. c. lxxxv, for the construction of a railway from Morpeth to a junction with the North Tyne section of the Border Counties Railway. In 1860, the company entered into a contract with Messrs. Trowsdale for certain works connected with the railway. By the 28th article of this contract it was stipulated that "John Furness Tone, or, in case of his death, incapacity, refusal to act, or removal, such other person as the company might from time to time appoint, should be the company's engineer for the purpose of this contract." And by article 32 it was provided that "every difference which shall at any time arise between the contractors, their heirs, executors, or administrators, or any of them, on the one hand, and the company on the other hand, touching the true intent or construction or the incidents or consequences of this contract, or as to anything to be done, omitted, or suffered in pursuance of this contract, or as to the mode of carrying this contract into effect, or as to any breach or alleged breach of this contract, or as to any claims on account of such breach or alleged breach, or as to obviating or compensating for the consequences of any such breach, or otherwise relating to any of the subject-matters of this contract, shall be referred by the

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parties in difference, and may be referred by either of them, to John Furness Tone, *if and so long as he shall continue to be the company's principal engineer*, notwithstanding that he is or shall be a shareholder in the said company, as sole arbitrator." In the event of Tone ceasing to be qualified, Robert Stephenson of Newcastle was to be the arbitrator.

By the North British Railway (Wansbeck Railway and Finance) Act, 1863, (26 & 27 Vict. c. cxciv) s. 24, power was given to the Wansbeck Railway Company and the North British Railway Company to become amalgamated; and by s. 26 of that act the Wansbeck Railway Act, 1859, was partially repealed. By s. 27 it was provided and enacted that, after the commencement of the amalgamation, the provisions of the Wansbeck Railway Act, 1859, not repealed, should apply to the North British Railway Company in like manner and in all respects as before the amalgamation they applied to the Wansbeck Railway Company, and the railways and works authorized by the said Wansbeck Railway Act, 1859, should thenceforth form part of the undertaking of the North British Railway Company; and s. 29 enacts that "all contracts and agreements, and all other acts and things made, done, entered into, or instituted under or by virtue or in consequence of or confirmed by the act thereby in part repealed, or with reference to any of the purposes thereof, should after and notwithstanding such repeal be as good, valid, and effectual to all intents and purposes as they would have been if the said act had not been thereby in part repealed, and might be proceeded on and enforced accordingly, the North British Company, after the amalgamation, being in all respects with reference to such matters substituted for the Wansbeck Railway Company." And by s. 31 of the act of 1863 it was provided that, notwithstanding the amalgamation and repeal in part of the Wansbeck Railway Act, 1859, and except only as was by the act of 1863 or otherwise expressly provided, everything before the amalgamation done and suffered under or confirmed by any provision thereby repealed of the said Wansbeck Railway Act, 1859, should be as valid as if such provision had not been repealed, and the repeal thereof, and the act of 1863, and the amalgamation, respectively, should accordingly be subject and without prejudice

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to anything so done, suffered, or confirmed, and to all rights, liabilities, claims, and demands, both present and future, which, if the said provisions had not been repealed and the said act of 1863 were not passed, and the amalgamation had not taken place, would be incident to or consequent on any and every thing so done or suffered; and the North British Railway Company, after the commencement of the amalgamation, should be liable in respect to all such rights, liabilities, claims, and demands, in the same manner and to the same extent as the Wansbeck Railway Company would have been liable in respect of such rights, liabilities, claims, and demands, in case the said act of 1863 had not passed, or the amalgamation had not taken place.

After the passing of the Amalgamation Act, disputes arose between the Wansbeck Railway Company and Messrs. Trowsdale touching the contract, which the company claimed to have referred to Mr. Tone. Messrs. Trowsdale objected that, by the amalgamation of the Wansbeck Railway Company with the North British Railway Company, the existence of the former company was at an end, and that consequently Tone had ceased to be their "principal engineer," within the meaning of the contract, and Mr. Stephenson became the proper referee. Notwithstanding Messrs. Trowsdale's protest, Tone proceeded with the references ex parte, and made two awards.

C. Pollock obtained a rule nisi to set aside the awards, on the ground that Tone was not the proper referee within the terms of the agreement.

Mellish, Q.C., and *R. J. Russell*, shewed cause. Tone was clearly the proper person to whom these disputes were to be referred under the terms of the original contract. Although he did not become the principal engineer of the amalgamated company, quoad this part of the line he continued to act as before the amalgamation. He superintended and certified for all the works done by these contractors.

C. Pollock was called upon to support the rule. Tone was named as arbitrator solely because he was the principal engineer of the Wansbeck Railway Company; and he was to continue to be the referee "if and so long as he should continue to be the company's principal engineer." It was therefore assumed that he might cease to fill that character. Upon the amalgamation of the

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Wansbeck Railway Company with the North British Railway Company, under the 26 & 27 Vict. c. cxciv, the former company ceasing to exist as a separate concern, and there being no provision in the Amalgamation Act continuing him in that character, Tone ceased to be the "principal engineer" referred to in the contract. The now principal engineer would be the principal engineer of the North British Railway Company. The Court will in fact be legislating, instead of construing the contract of the parties, if they hold that Tone continues to be the referee agreed upon.

[KEATING, J. Has the principal engineer of the North British Railway Company any jurisdiction over the Wansbeck part of the line ?]

No doubt he would have: by the latter part of s. 29, the North British Railway Company is substituted for the Wansbeck Railway Company.

ERLE, C.J. I think this rule should be discharged. Whilst the Wansbeck Railway Act, 22 & 23 Vict. c. lxxxv, was the sole special act in force for regulating the affairs of the Wansbeck Railway Company, a contract was entered into between Messrs. Trowsdale and the company for certain works connected with that railway. In that contract there was, amongst others, a stipulation, that one Tone, or, in case of his death or removal, such other person as the company might from time to time appoint, should be the company's engineer for the purpose of that contract; and a further stipulation that every difference which should at any time arise between the contractors and the company touching the meaning or incidents of the contract, or as to the mode of carrying it out, or as to any breach thereof, &c., should be referred by the parties or either of them to Tone, "*if and so long as he should continue to be the company's principal engineer*," and in the event of Tone ceasing to be the engineer of the company, or declining to act, then the reference was to be to Mr. Stephenson, of Newcastle. Whilst this contract was in force, an act (26 & 27 Vict. c. cxciv) passed for amalgamating the Wansbeck Railway Company with the North British Railway Company. By that act many of the provisions of the Wansbeck Act were repealed, and the North British Railway Company became the name of both companies, the former company for all practical purposes merging in the new

amalgamated company. The 29th section of the Amalgamation Act contains the provision for continuing existing contracts: it enacts that all contracts and agreements and all other acts done or entered into under or by virtue of the act thereby in part repealed, should, notwithstanding such repeal, be as good, valid, and effectual, to all intents and purposes, as they would have been if the act had not been so repealed, and might be proceeded on and enforced accordingly, the North British Company, after the amalgamation, being in all respects, with reference to such matters, substituted for the Wansbeck Railway Company. This, as it seems to me, keeps alive the contract, and with it the stipulation for a reference to arbitration, just as if the Wansbeck Act had been the only act in force. I think it was clearly the intention of the parties that Tone, who continues to be the engineer so far as regards the English portion of the line, should for all the purposes of this contract still be the arbitrator; and that it was not the intention of the parties that the principal engineer of the amalgamated company should be substituted for him. The event has not arisen by the death, removal, or unwillingness of Tone to act, which was to make Mr. Stephenson the proper referee under the contract.

KEATING, J. I am quite of the same opinion. If Mr. Pollock could have shewn that the duties of Tone had been varied, or his powers curtailed, or his position with reference to the contractors in any way changed by the Amalgamation Act, there would have been much force in his argument. Tone's position, however, remains unchanged. He is still the principal engineer over the Wansbeck portion of the North British Railway.

MONTAGUE SMITH, J. I am of the same opinion. By the 29th section of the 26 & 27 Vict. c. cxciv, the contract is to be proceeded with and enforced as before. The legislature has merely substituted the North British Railway Company for the Wansbeck Railway Company, quoad all existing contracts entered into by the latter company. The Wansbeck Railway Company are still proceeding on the contract in the name of the North British Railway Company.

Rule discharged.

Attorney for the company: *C. W. Laws, Newcastle.*

Attorneys for Messrs. Trowsdale: *C. & H. Tahourdin.*

Dictum of WILLES, J., at p. 288, *explained.* HORTON *v.* LONDON GRAVING DOCK CO., LTD. [1950] 1 All E.R. 180.

LONDON GRAVING DOCK CO., LD. [1950] 1 K. B. 421

Applied. HORTON *v.* LONDON GRAVING DOCK CO., LTD. [1949] 2 All E.R. 169.

Applied. HORTON *v.* LONDON GRAVING DOCK CO. [1949] 2 K. B. 584

1866
Feb. 26.

INDERMAUR *v.* DAMES.

Negligence—Unfenced Hole on Defendant's Premises—Injury to a Stranger rightfully there.

Upon the premises of the defendant, a sugar-refiner, was a hole or shoot on a level with the floor, used for raising and lowering sugar to and from the different storeys of the building, and usual, necessary, and proper in the way of the defendant's business. Whilst in use, it was necessary and proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might at such times, without injury to the business, have been fenced by a rail. Whether or not it was usual to fence similar places when not in actual use, did not appear. The plaintiff, a journeyman gas-fitter in the employ of a patentee who had fixed a patent gas-regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole, and was injured:—

Held, that, inasmuch as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced.

THIS was an action brought by the plaintiff to recover damages for an injury which he had sustained through the alleged negligence of the defendant and his servants.

The declaration stated, that the defendant was possessed of a high building, containing several floors, used by the defendant as a sugar-refinery, in the interior of which was a shaft or shoot passing from the basement of the building upwards through the several floors thereof, and which said shaft or shoot was highly dangerous to persons entering the said building who might be unacquainted with the same, as the defendant then well knew; and that the plaintiff, then being unacquainted with the said premises, was employed by the defendant to enter the said building and execute certain work in his trade of a gas-fitter, after darkness had set in in the evening, for the defendant, upon one of

the upper floors of the said building; yet that the defendant, wrongfully, negligently, and improperly allowed the said shaft or shoot to remain and be open, unfenced, and unguarded and unlighted, whilst the plaintiff was executing the said work, whereby the plaintiff, whilst so employed as aforesaid, fell down the said shaft or shoot, and was precipitated through the same to the basement of the said building, and was greatly hurt, &c.

Pleas,—1. Not guilty. 2. That there was no such shaft or shoot, as alleged. 3. That the said shaft or shoot was not dangerous, as alleged. 4. That the defendant had no such knowledge of the said danger, as alleged. 5. That the plaintiff was not employed by the defendant, as alleged. Issue thereon.

The cause was tried before Erle, C.J., at the sittings in Middlesex after last Michaelmas Term. The facts were as follows:—The plaintiff, who was a journeyman gas-fitter, was at the time of the accident hereinafter mentioned in the employ of one Duckham, a gas-engineer and fitter, who was the patentee of an improved self-acting gas-regulator. The defendant is a sugar-refiner having extensive premises in Whitechapel. In June, 1864, Duckham, through one Hargreaves, his agent, agreed with the defendant, who was necessarily a large consumer of gas, to fit up on his premises two of his regulators, upon the terms mentioned in the following memorandum:—

"I hereby agree to attach two of my patent self-acting gas-regulators to your meter in area; and, should I fail to effect a saving of from 15 to 30 per cent. on your previous consumption, I will remove the regulators, and restore the fittings at my own expense. Should I effect such saving, the machines will be considered, *after test*, as purchased, and a three years' guarantee given with them. The price to be (two 2-inch) 18*l*."

On Saturday, the 25th of June, Hargreaves went to the defendant's premises, pursuant to appointment, for the purpose of fixing the apparatus. He was accompanied by the plaintiff and another workman in Duckham's employ, named Bristow, and a lad. The plaintiff, however, not being upon that occasion quite sober, Mr. Woods, the defendant's manager, would not allow him to go upon the premises, and the regulators were fixed by Bristow, assisted by the lad, and the work was duly completed. In order to test the

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regulators, and ascertain that they answered the warranty as to saving in the consumption of gas, it was necessary for the workmen of the patentee to inspect every burner on the premises, to see that they were in a proper state. Bristow having had to do the work almost single-handed, it was too late to make the required inspection on the Saturday night; and accordingly Hargreaves went to the premises on the following Tuesday, accompanied by the plaintiff, in order to examine the several burners and so test the apparatus. Before going there for that purpose, Hargreaves cautioned the plaintiff, saying, "Now, mind, Indermaur, sugar-houses are very peculiar places: they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man; and you keep close to me." When they arrived at the premises, Hargreaves and the plaintiff, accompanied by one of the defendant's workmen with a light, proceeded to the first floor, and, after examining one of the burners, went round to another part of the floor for the purpose of inspecting another. In the meantime, the plaintiff, who had left a pair of plyers at the spot they first went to, turned back to fetch them; but, in returning, instead of going round the way Hargreaves and the defendant's man had gone, he walked straight across towards them, not perceiving an intervening hole in the floor, and fell through to the floor below, a depth of about thirty feet, and fractured his spine.

The hole in question was a shaft or shoot four feet three inches square, communicating from the basement to the several floors of the building. It was fenced at each side, but open back and front. It was necessary to the defendant's business to have such a shaft; and it was necessary that it should, whilst in use for the raising or lowering of goods, and occasionally also for purposes of ventilation, be open and unfenced; and there was no evidence to shew that it was usual in buildings of the kind to adopt the precaution of fencing such shafts.

On the part of the defendant it was submitted that there was no duty or obligation on him to fence the shaft, and consequently no cause of action; and reliance was placed upon *Wilkinson* v. *Fairrie*. (1)

(1) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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His lordship observed that, though as to persons employed in the business there might be no duty or obligation to fence, a very different degree of care might be due in the case of a person not so employed, but merely going there for a temporary lawful purpose, as this plaintiff did. He, however, reserved the point.

Several witnesses were then called on the part of the defendant; amongst others, Mr. Woods, the defendant's manager, who stated that the defendant's premises (which had been recently erected) were constructed in the same way as all sugar-refineries were constructed, and were not more than ordinarily dangerous; and that, if he had known that the plaintiff was coming to work upon the premises, he would not have allowed him to do so.

The evidence as to the number of lights on the floor at the time of the accident was conflicting. The plaintiff swore that there were only two; the defendant's witnesses that there were five, and that the light was ample.

In his summing-up, the Lord Chief Justice stated in substance as follows:—The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in

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the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

The jury returned a verdict for the plaintiff, damages 400*l.*

Huddleston, Q.C., in Hilary Term, obtained a rule nisi to enter a nonsuit, on the ground that the evidence did not disclose any cause of action; or to arrest the judgment, on the ground that the declaration shewed no breach of contract or breach of duty on the part of the defendant; or for a new trial, on the ground that the verdict was against the weight of evidence. He referred to *Seymour* v. *Maddox* (1), *Hounsell* v. *Smyth* (2), and *Wilkinson* v. *Fairrie*. (3*)

[WILLES, J., referred to *Farrant* v. *Barnes*. (3)]

Ballantine, Serjt., and *Raymond*, shewed cause. There was abundant evidence for the jury in this case, of a culpable want of due care on the part of the defendant as regards this plaintiff. He was on the premises, not as a mere volunteer, or in the character of a visitor, as in *Southcote* v. *Stanley* (4): nor does the case fall within the class relating to injuries to servants in the course of their employ, by reason of defective machinery. Here, the plaintiff was upon the premises by the permission of the defendant, in the performance of his duty as a gas-fitter. The nature of the premises, with its hidden dangers, was unknown to him: and the caution which was given to him did not go far enough; it did not call his attention to the particular peril, but seemed rather to be directed to the safety of the premises than to that of the individual. The rule as to dangerous pit-falls is accurately laid down in *Barnes* v. *Ward* (5), *Corby* v. *Hill* (6), and *Hounsell* v. *Smyth*. (7) The application of that rule must depend upon the circumstances of each particular case.

[WILLES, J. The proposition is, that this was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant.]

(1) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

(2) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203.

(3*) 1 H. & C. 633; 32 L.J. (Ex.) 73.

(3) 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137.

(4) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(5) 9 C. B. 392; 19 L. J. (C.P.) 195.

(6) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.

(7) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203, and see Hadley *v.* Taylor, antè, p. 53.

Precisely so. It was conceded that this shaft or shoot was matter of imminent peril, unless the floor was properly lighted, as to which there was a conflict of testimony which is disposed of by the finding of the jury. The case which approaches the nearest to this undoubtedly is that of *Wilkinson* v. *Fairrie*. (1) There, the plaintiff, a carman, was sent by his employer to the defendant's premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured. The Court of Exchequer held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. The obvious distinction between that case and this is pointed out by Pollock, C.B. He says: "My Brother Bramwell directed a nonsuit upon this alternative,—if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light: if it was sufficiently light for him to see, he might have avoided the staircase, *which is a very different thing from a hole or a trap-door*, through which a person may fall. We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury."

[WILLES, J. *Farrant* v. *Barnes* (2) is more like this case. There, the defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to the plaintiff, the servant of a Croydon carrier, without communicating to him (and there being nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff (the servant of the carrier) to the cart, the carboy from some unexplained cause burst, and its contents flowed over and severely burnt the plaintiff; and this Court held that the defendant was liable for the injury thus resulting from his breach of duty.]

Huddleston, Q.C., and *Griffits*, in support of the rule. The

(1) 1 H. & C. 633; 32 L. J. (Ex.) 73.
(2) 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137.

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question is whether there was any contract or any duty on the part of the defendant to fence this shoot. The plaintiff was not employed by the defendant to do work on the premises; nor can it be said that he was there with the permission of the defendant: on the contrary, it was distinctly proved that he was there against the will of the defendant's manager. But, assuming that he was there by the permission of the defendant, the defendant was under no obligation to him to fence. For all practical purposes of his business, fencing was unnecessary and objectionable. The premises were shewn to have been constructed in the usual way. The mode in which the proposition has been stated, viz. that here was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant, is much too narrow: it should exclude the fact that the plaintiff had any reasonable opportunity of knowing of the danger. There could be no more obligation here to fence than there was in *Hounsell* v. *Smyth*. (1)

[MONTAGUE SMITH, J. The plaintiff was neither invited nor employed there.]

The plaintiff here was not invited, neither was he employed by the defendant. He was sent by Duckham in order to ascertain whether the work which had already been completed was so done that his employer could enforce his bargain with the defendant. That clearly gave him no more right than the visitor had in *Southcote* v. *Stanley*. (2) The authorities upon this subject are all reviewed in a very learned judgment of Lord Chief Baron Pigot, in a case of *Sullivan* v. *Waters*. (3) In an action under Lord Campbell's Act (9 & 10 Vict. c. 93), by the administratrix of P. S., the summons and plaint alleged, that, before &c., the defendants were in possession of a certain distillery and lofts and stores connected therewith, and that the said P. S. (deceased) was employed by the defendants as a labourer to do certain work in and about the said distillery at night; that P. S., whilst so employed, had access, by the license of the defendants, to one of the said lofts at night, and by such license used the same for the purpose of sleeping during the intervals of the night when he was not actually

(1) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203.
(2) 1 H. & N. 247; 25 L. J. (Ex.) 339. (3) 14 Ir. C. L. R. 460.

engaged in his said employment; yet that the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture, then in the floor of the said loft, to remain open, without being properly guarded and lighted, by reason whereof the said P. S., whilst passing in the night along the floor of the said loft in pursuance of the said license, fell through the said aperture and was thereby injured, and died: and on demurrer it was held that the summons and plaint disclosed neither a contract nor a duty binding on the defendants to guard or light the aperture in question. After referring to several cases, the learned Chief Baron says: "How far the owner of premises, who gives to another person license to enter and use them, is answerable for negligence in not guarding from danger existing on the premises the person to whom he gives such license, is not very clearly defined by the decisions which have been made on questions of this nature. A distinction seems, however, to have been taken between the case of a person who enters *and uses* the owner's premises by the owner's express invitation, or as a customer, who, as one of the public, is induced by the owner to come to his premises for the purposes of business carried on by the owner there, on the one side; and, on the other, the case of a mere visitor or guest, invited or uninvited, or of a person who has a mere license to go upon the premises of the owner. The first class of cases comprises those of *Corby* v. *Hill* (1) and *Chapman* v. *Rothwell* (2), to which may be added *Gallagher* v. *Humphrey*. (3) In the second we find *Southcote* v. *Stanley* (4), *Hounsell* v. *Smyth* (5), *Bolch* v. *Smith* (6), and *Wilkinson* v. *Fairrie*." (7) And, towards the close of his judgment, his Lordship says: "This may, I think, be safely laid down as established by the second class of decisions to which I have referred, that a mere license given by the owner to enter and use the premises, which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any

(1) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.

(2) E. B. & E. 168; 27 L. J. (Q.B.) 315.

(3) 6 L. T. (N.S.) 684.

(4) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(5) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203.

(6) 7 H. & N. 736; 31 L. J. (Ex.) 201.

(7) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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existing source of danger is apparent, creates no such obligation (that is, to guard the licensee against danger,) in the owner."

[MONTAGUE SMITH, J. The duty is to be implied from the facts.]

No duty was implied from the facts which existed in *Wilkinson* v. *Fairrie* (1), and which were quite as strong as the facts here. "As there was no contract," says the Chief Baron, "or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right."

[WILLES, J. This is more like *Toomey* v. *London and Brighton Railway Company* (2), where the plaintiff was injured by falling down some steps at a railway station, through a door which he had opened by mistake; and the Court held that there was no evidence of negligence to go to the jury.]

In *Bolch* v. *Smith* (3), it was held that there was no duty cast by law on a government contractor to fence a shaft crossing a path in a dockyard, the want of fencing being apparent. Martin, B., there says: "It is true the plaintiff had permission to use the path. Permission involves leave and license, but it gives no *right*. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right: it is an excuse or license; so that the party cannot be treated as a trespasser."

[MONTAGUE SMITH, J. Wilde, B., says: "The danger was open and visible; there was nothing which could be called a 'trap.'" Besides, the plaintiff was a workman employed upon the premises.]

The utmost that can be said here, is, that the plaintiff was upon the premises by the same sort of tacit permission as that spoken of by Williams, J., in *Hounsell* v. *Smyth*. (4) He was there in the course of doing something for the satisfaction of his employer, Duckham, not on any work for the benefit of the defendant. Or, if he can be said to have been doing work for the defendant, in

(1) 1 H. & C. 633; 32 L. J. (Ex.) 73.

(2) 3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.

(3) 7 H. & N. 736; 31 L. J. (Ex.) 201.

(4) 7 C. B. (N.S.) 731, 744; 29 L. J. (C.P.) 203.

what does his position differ from that of the supernumerary employed at the theatre, in *Seymour* v. *Maddox*? (1) Erle, J., in that case, says: "A person must make his own choice whether he will accept employment on premises in this condition;" that is, with an unfenced hole in the floor; "and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light. If he sustain injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." The decision in *Farrant* v. *Barnes* (2) rests upon this ground, that it is the duty of one who sends a dangerous article by a carrier to inform him of the danger, in order that he may, by using more than ordinary care, avoid it. Willes, J., refers to the shipment, without due notice, of articles liable to spontaneous combustion; a doctrine dealt with in *Williams* v. *The East India Company* (3), and in *Brass* v. *Maitland*. (4) But how can that principle apply here? *Clarke* v. *Holmes* (5) was the case of unfenced machinery; and there there was abundant evidence of wilful neglect on the part of the defendant.

[KEATING, J. The judgment of the Exchequer Chamber in that case proceeded upon the statutes, 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38; though two of the judges thought the defendant would have been liable by the common law.]

There was no misfeasance here on the part of the defendant. The plaintiff was warned of the dangerous character of the premises, or rather of the necessity for great caution in moving about them, before he went there: and a person was sent with a light to shew him where to go. It was his own misfortune that he deviated from the safe path. He knew the general nature of the premises, and that more than ordinary care and caution were necessary.

Cur. adv. vult.

Feb. 26. The judgment of the Court (Erle, C.J., Willes, Keating, and Montague Smith, JJ.) was delivered by

(1) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

(2) 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137.

(3) 3 East, 192.

(4) 6 E. & B. 470; 26 L. J. (Q.B.) 49.

(5) 7 H. & N. 937; 31 L. J. (Ex.) 356. Reported below, 6 H. & N. 349; 30 L. J. (Ex.) 135.

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WILLES, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for 400*l.* damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C.J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pit-fall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst

the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (dilectus personæ), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him: see *Hounsell* v. *Smyth.* (1)

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

(1) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203.

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It is observable, that, in the case of *Southcote* v. *Stanley* (1), upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver: *Macarthy* v. *Younge*. (2) The case of the carboy of vitriol (3) was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour* v. *Maddox* (4), also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his

(1) 1 H. & N. 247; 25 L. J. (Ex.) 339.

(2) 6 H. & N. 329; 30 L. J. (Ex.) 227.

(3) *Farrant* v. *Barnes*, 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137.

(4) 16 Q. B. 326; 20 L. J. (Q.B.) 327.

protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke* v. *Holmes*. (1)

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: *Lancaster Canal Company* v. *Parnaby* (2); per cur. *Chapman* v. *Rothwell* (3), where *Southcote* v. *Stanley* (4) was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote* v. *Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going

(1) 7 H. & N. 937; 31 L. J. (Ex.) 356: and see *Bolch* v. *Smith*, 7 H. & N. 736; 31 L. J. (Ex.) 201.

(2) 11 Ad. & E. 223; 3 P. & D. 162.

(3) E. B. & E. 168; 27 L. J. (Q.B.) 315.

(4) 1 H. & N. 247; 25 L. J. (Ex.) 339.

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himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson* v. *Fairrie* (1), relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shewn, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience: and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

(1) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved,—in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit.

The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial, without a reasonable expectation that another jury

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might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

Attorneys for plaintiff: *Sturmy & Diggles.*
Attorney for defendant: *G. Henderson.*

TUNNEY *v.* THE MIDLAND RAILWAY COMPANY.

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Jan. 23.

Master and servant—Negligence of fellow-servant—Common employment.

The plaintiff was employed by a railway company as a labourer to assist in loading what is called a "pick-up train" with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started,) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured:—

Held, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.

THE first count of the declaration stated that the plaintiff was in the employ of the defendants, and, while in such employ, at the request of the defendants, and in discharge of his duty as their servant, was being conveyed in a carriage of the defendants upon a railway of which they were possessed, to go from a certain place to a certain other place, which carriage was drawn by a locomotive steam-engine, under the guidance and direction of the defendants; that the defendants were in the possession of another locomotive steam-engine which was then drawing other carriages upon the said railway, also under the guidance and direction of the defendants; and that the defendants conducted themselves in so negligent, unskilful, and improper a manner in and about the guidance and direction of the last-mentioned steam-engine and carriages, that, through their negligence and want of competent care and skill, the last-mentioned steam-engine and carriages ran into and were driven violently against the carriage in which the plaintiff was being conveyed, by means whereof the carriage was broken and the plaintiff injured.

The second count alleged that the defendants were carriers of passengers upon a railway from a certain place to a certain other place, for reward; that the plaintiff became and was received by

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them as a passenger to be carried for reward; and that they did not carry him safely, whereby &c.

The third count stated, that, in consideration that the plaintiff would enter into the service of the defendants, and serve them for a week, and thereafter from week to week as long as the plaintiff and the defendants should respectively please, in the capacity of a labourer upon their railway, the defendants promised the plaintiff to pay him during such service wages at the rate of 15*s.* per week, and also safely and securely to carry him upon their railway every morning from Birmingham to the place where he might be required to work for them as such labourer as aforesaid, and in like manner every evening safely and securely to carry him from the place where he might have been working for the defendants during the day to Birmingham aforesaid; that the plaintiff entered into the said service in the capacity and on the terms aforesaid, and continued in such service until the breach thereinafter alleged; yet that the defendants did not safely and securely carry the plaintiff backwards and forwards night and morning in the manner so agreed upon as aforesaid, but through their negligence, &c., the plaintiff was injured, &c.

The defendants pleaded not guilty, and several special pleas alleging in substance that the injury arose through the carelessness of a fellow-servant. The more material of these pleas were the fifth and the sixth.

The fifth alleged that the plaintiff, being a servant of the defendants, became such passenger on the occasion and under the circumstances and for the purpose in the second count mentioned, and that the reward to the defendants was the service by the plaintiff as the defendants' servant to be performed; that the negligence complained of was the negligence of certain other servants of the defendants having the guidance and direction of the train and railway in and by which the defendants were carrying the plaintiff, which negligence caused a collision with another train; that the collision was caused by the negligence and unskilfulness of the said other servants; that the said servants were fit and competent; that their carelessness was unauthorized by and unknown to the defendants; and that, except so far as they were prevented by the said negligence and unskilfulness of the said

servants, the defendants did safely and securely carry the plaintiff according to the agreed terms in the second count mentioned.

The sixth plea alleged that the carelessness and unskilfulness was committed in the performance for the defendants of an employment common both to the plaintiff and the said other servants as such servants of the defendants.

The plaintiff joined issue on all the pleas.

At the trial before Mellor, J., at the last Summer Assizes at Warwick, it appeared that the plaintiff was employed as a labourer, at wages of 15*s.* a week, to travel up and down the defendants' line from Birmingham to Derby with a train called a "pick-up train," for the purpose of removing from the line any materials which might have been left there by the plate-layers and others; that it was his duty to be ready at Birmingham to start at 6 a.m., his hours of labour ending at 5.30 p.m., when he was with his fellow-labourers to be brought back to Birmingham; that, whilst returning from one of the excursions after 5.30 p.m., there being no pointsman at the Branston siding, at which the trucks were to be weighed, one of the men, by the direction of the guard, got down and opened the points and turned the train into the siding, where it came into collision with a coal train, and the plaintiff was much injured.

On the part of the defendants it was submitted that the plaintiff was not entitled to recover, the accident being the result of negligence of a fellow-servant; and *Priestly* v. *Fowler* (1) was relied on.

It was insisted for the plaintiff that the true cause of the accident was the false economy of the company in not employing a pointsman at the spot where it occurred; and that the doctrine as to negligence of a fellow-servant could not apply here, inasmuch as the plaintiff's hours of labour being ended, he was no longer in the company's service, but was being carried back by them to Birmingham in the character of a passenger.

The learned judge, upon the authority of *Priestly* v. *Fowler* (1), and the cases which have followed it, directed a verdict for the defendants, reserving the plaintiff leave to move to enter a verdict for him for 100*l.*, the damages assessed by the jury, if the Court

(1) 3 M. & W. 1.

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should think the case distinguishable; the Court to have power to draw inferences of fact.

Gibbons, in Michaelmas Term, obtained a rule to enter a verdict for the plaintiff for 100*l.*, on the grounds, first, that the plaintiff was not in the actual service of the defendants at the time of the injury; secondly, that the injury complained of was not caused by the negligence of a fellow-workman, but by the wilful negligence of the defendants. The rule was mainly granted upon a suggestion that the case of *Morgan* v. *The Vale of Neath Railway Company* (1), involving a similar point, was standing for consideration in the Exchequer Chamber.

Field, *Q.C.*, and *A. Wills*, shewed cause. The accident was the result of carelessness on the part of a fellow-workman, for which, according to *Priestly* v. *Fowler* (2), *Waller* v. *The South Eastern Railway Company* (3), *Lovegrove* v. *The London and Brighton Railway Company* (4), and numerous other cases, the defendants are not responsible, assuming that they have used ordinary care in employing reasonably competent persons. As to the argument that, because his hours of labour were over when the collision occurred, the plaintiff is to be taken to have become a passenger, the obvious answer to that is, that his conveyance to and from his work was incident to his employment, and was part of the contract under which he was engaged. In *Morgan* v. *The Vale of Neath Railway Company* (5), the Exchequer Chamber has now decided that the rule which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant, applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. The American case of *Gilshannon* v. *The Stony Brook Railroad Corporation* (6) is

(1) 5 B. & S. 570; 33 L. J. (Q.B.) 260.
(2) 3 M. & W. 1.
(3) 2 H. & C. 102; 32 L. J. (Ex.) 205.
(4) 16 C. B. (N.S.) 669; 33 L. J. (C.P.) 329.
(5) Law Rep. 1 Q. B. 149.
(6) 10 Cush. R. 228.

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exactly in point. There, the plaintiff was a common labourer, employed in repairing the defendants' road-bed at a place several miles from his residence. Each morning and evening he rode with other labourers to and from the place of labour on the gravel train of the defendants. This was done with the consent of the company and for mutual convenience, no compensation being paid directly or indirectly by the labourers for the passage, and the company being under no contract to convey the labourers to and from their work. While thus on their way to their work on one occasion a collision took place with a hand-car on the track, through the negligence of those having charge of the gravel train, and the plaintiff was thrown off and run over by the gravel train, for which injury the action was brought, and it was held that the defendants were not liable. Mr. Justice Dewey, in delivering judgment, said: "How does this case differ from that suggested at the argument of the counsel for the defendants, who supposed a case where the business for which the party is employed is that of cutting timber or standing wood, and the servant receives an injury in his person on the way to the timber-lot by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case."

Gibbons (*Kenealey* with him) was called upon to support his rule. The obvious distinction between *Morgan* v. *The Vale of Neath Railway Company* (1) and the present case, is, that here the accident resulted, not from the mere negligence of a fellow-servant, but from the want of a pointsman at the Branston station.

[ERLE, C. J. The points being shut, the guard of the train in which the plaintiff was, wrongfully or negligently caused them to be opened, and so the accident happened. I am unable to discover any distinction on the ground suggested.]

Then, as to the second ground of the motion. The plaintiff was not in the service of the company at the time he sustained the injury of which he complains. His service for the day was at an end. He was then travelling as an ordinary passenger. The circumstance of the company conveying him to and from the place where he was employed free of charge was merely a mode of

(1) Law Rep. 1 Q. B. 149.

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remunerating him for his services; they were still bound to carry him safely, as much as if he paid for his journey. Suppose a railway company gives one of its servants a ticket or a pass on a journey taken for his own pleasure, would the mere fact that he had not paid for his ticket deprive him of the right to claim compensation for an injury sustained by him on that journey through the negligence of those having the conduct of the train? Alderson, B., delivering the judgment of the Court in *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company* (1), says: "We do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, *where the servant injured was not at the time of the injury acting in the service of his master.* In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant." A rule which has been established for the protection of employers ought not to be stretched beyond its legitimate limits to the injury and oppression of the employed. This plaintiff was not bound by any duty which he owed to his employers to go back to Birmingham every night. He went because his home was there.

ERLE, C.J. The rule has been settled by a series of cases, beginning with *Priestly* v. *Fowler* (2), and ending with *Morgan* v. *The Vale of Neath Railway Company* (3), that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both. Here, the injury of which the plaintiff complains was caused by the negligence of the guard of the train in which the plaintiff was being carried, in directing another servant of the company to open the points at an improper time, and so causing the train to come into collision with a coal train. The only question is, whether the plaintiff was at the time in the employ of the company. Clearly he was. It was part of his contract of service that he was to return each day to Birmingham

(1) 5 Ex. 343; 19 L. J. (Ex.) 296. (2) 3 M. & W. 1.
(3) Law Rep. 1 Q. B. 149.

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by the pick-up train, to be ready to start upon his work the next morning. There is nothing, therefore, to take the case out of the ordinary rule. The verdict for the defendants must stand.

WILLES, J. I am of the same opinion. There is always a strong inclination to find some mode of giving the plaintiff redress in cases of this sort. But one man's misfortune must not be compensated for at another man's expense. It is quite clear that the company cannot be liable in this case. The plaintiff, whilst in their service, was injured through the negligence of another servant. The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference; for, it was part of his contract that he was to be carried by the train to and from the place where his work happened to be.

KEATING, J. I am of the same opinion. We are bound by the finding of the jury that it was part of the plaintiff's contract with the company that he should be carried back to Birmingham at the end of each day. I cannot, therefore, see any possible distinction between this and the numerous cases which have laid down the rule, that a master is not responsible for an injury happening to a servant through the negligence of another servant in his employ.

MONTAGUE SMITH, J., concurred.

Rule discharged.

Attorney for plaintiff: *C. Beaton*, Birmingham.
Attorneys for defendants: *Beale, Marigold, & Beale.*

BUCK *v.* HURST AND BAILEY.

Jan. 25.

I.O.U.—Money lent—Account stated.

The plaintiff lent money to A. upon B.'s promise to become surety for its repayment: and, after the money was advanced, A. and B. signed and delivered to the plaintiff the following memorandum: "We jointly and severally owe you 60*l.*":—*Held*, evidence for the jury of an account stated by A. and B. jointly.

DECLARATION for money lent and money found due upon accounts stated.

Plea, never indebted.

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The facts which appeared at the trial before Byles, J., at the sittings in this term, were as follows:—Buck, at the request of one Cox, a mutual friend, agreed to lend Bailey 60*l.* upon Hurst's guarantee. The money was advanced in two different sums at two different times, and a memorandum in these words was afterwards signed by Hurst and Bailey: "We jointly and severally owe you 60*l.*" Upon this document being put in, it was objected on the part of the defendant Hurst that there was no joint cause of action, either for money lent or upon an account stated, inasmuch as there was no debt due from Hurst.

The learned judge proposed to amend the declaration by striking out the name of Hurst; but the counsel for the plaintiff declined to amend. Ultimately, a verdict was directed for the plaintiff for the sum claimed.

Griffits now moved for a new trial, on the ground that there was no evidence to go to the jury as against Hurst.

[WILLES, J. Was not the memorandum evidence for the jury of a joint promise? The substance of the transaction is, that Hurst agrees to become Buck's debtor jointly with Bailey.]

There was no evidence of a joint request to lend the money. Bailey was the person primarily liable for the debt; Hurst was a mere surety, who was only liable to be called upon if Bailey made default. To support an account stated, there must be an admission of a debt due: *Lemere* v. *Elliott.* (1) There, the defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and, on being asked for a deposit, gave an I. O. U. for 25*l.*, but afterwards refused to complete the purchase; and it was held that the I. O. U. was not evidence of an account stated. An improperly stamped promissory note is not receivable as evidence of an account stated: *Green* v. *Davies.* (2) So, an I. O. U. given for the debt of a third person is not evidence of an account stated, there being no original liability: *French* v. *French* (3); *Petch* v. *Lyon.* (4)

[ERLE, C.J. No doubt an account stated must refer to a debt

(1) 6 H. & N. 656; 30 L. J. (Ex.) 350.

(2) 4 B. & C. 235; 6 D. & R. 306.

(3) 2 M. & G. 644; 3 Scott N.R. 121.

(4) 9 Q. B. 147.

due. But the case of *Gould* v. *Coombes* (1) seems to go straight to the point now before us. There, B., C., D., and E., gave a joint and several promissory note to A. for 200*l.* and interest, as security for a loan to C. On the death of E., B. obtained the note from A. for the purpose of procuring the signature of an additional party; and, to secure its return, B. and C. signed the following document: "I. O. Mr. A. the sum of 200*l.*, for value received." The note was returned by B. to A., with the name of F. added, but the I. O. U. was not given up. The alteration was made with the assent of all the parties. In an action by A. against B., it was held that, assuming the addition of the fifth name was such a material alteration as to avoid the note, inasmuch as the note was free from objection at the time the I. O. U. was given, it was admissible in evidence in support of an account stated by the I. O. U.

KEATING, J. The plaintiff would be entitled to recover on the mere proof of the defendants' handwriting to the I. O. U.]

No doubt. But that primâ facie case is rebutted here by the rest of the evidence, which shewed that there was no joint debt. The jury could not reject the circumstances under which it was shewn to have been given.

[MONTAGUE SMITH, J. Why is not the paper evidence of a new agreement? Why should not the jury be at liberty to presume that?]

ERLE, C.J. I am of opinion that there should be no rule. The facts seem to be these:—Bailey, through Cox, applied to the plaintiff for a loan. The plaintiff refused to advance the money without the guarantee of some responsible person. Bailey procured Hurst to consent to be surety for him, and the money was lent, and an I. O. U. afterwards given as an acknowledgment. If Hurst and Bailey had gone to the plaintiff, and said to him: "If you will advance Bailey the money, we jointly and severally promise to repay it," that, beyond all question, would have been evidence of a loan to the two. The evidence is, that, after the money was advanced, the two wrote down: "We jointly and severally owe you 60*l.*" Mr. Griffits contends, that, that being in the

(1) 1 C. B. 543.

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form of an I. O. U., there is no evidence of money lent to or of an account stated by the two. I think it clearly was some evidence to go to the jury.

WILLES, KEATING, and MONTAGUE SMITH, JJ., concurring,

Rule refused. (1)

Attorney for plaintiff: *H. A. Sherwood.*

Attorney for defendant: *G. J. Parsons.*

Jan. 27.

CRAFTER *v.* THE METROPOLITAN RAILWAY COMPANY.

Railway company—Negligence—Evidence for a jury.

The staircase leading from a railway station to a highway (being otherwise unobjectionable) had at the edge of each step a strip of brass which originally had been roughened, but which had from constant use become worn and slippery. The staircase was about six feet wide, and had a wall on each side, but no hand-rail. The plaintiff (a passenger by the railway, who was a frequent traveller by the line) in ascending from the station slipped and fell upon the stairs, and was much hurt. In an action charging the company with negligence in not providing a reasonably safe and convenient staircase, two witnesses for the plaintiff stated that in their opinion the staircase was unsafe, one of them (a builder) suggesting that brass nosings on the steps was improper, and that lead would have been better, because less slippery, and that there should have been a hand-rail:—

Held, no evidence of negligence to go to the jury.

THIS was an action against a railway company for alleged negligence.

The second count stated that the defendants were carriers of passengers for hire on their railway, and used a certain station for the reception and accommodation of the passengers thereon; that the station was in their possession and under their management; and that they negligently managed the said station, and kept the staircase and approaches thereto in a dangerous and slippery state, and did not provide hand-rails or sufficient accommodation for safe access to the carriages; and that the plaintiff, having been received by them as a passenger, fell and was thrown down the staircase, and was injured &c.

Plea, not guilty.

The cause was tried before Erle, C.J., at the sittings at West-

(1) See the judgment of Tindal, C.J., in *Cocking* v. *Ward*, 1 C. B. 858, 868.

minster after last Michaelmas Term, when the following facts appeared in evidence:—On the 28th of July, 1864, the plaintiff, who was a passenger by the defendants' railway from Farringdon Street to King's Cross, ascending the stairs at the King's Cross station to get to the highway, slipped and fell and was considerably injured. The cause of his slipping was, that a strip of brass which was placed at the edge of each step had by constant traffic been worn smooth. Two witnesses who were called on the part of the plaintiff, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, as well by reason of the nosing of brass as from the absence of a hand-rail. No witnesses were called on behalf of the defendants to contradict this; but it was proved that about 43,000 persons had passed up the staircase in question, during each month, since the station had been opened in 1863, and that no accident had ever happened there. It was also proved that the plaintiff was in the constant habit of travelling by the line, getting out at the same station.

It was contended on the part of the defendants that there was no evidence to go to the jury of any actionable negligence or the omission of any legal duty on their part.

His Lordship declined to nonsuit the plaintiff, but reserved leave to the defendants to move; and he left it to the jury to say whether or not the staircase afforded reasonable accommodation to the public.

The jury returned a verdict for the plaintiff, damages 105*l.*

Hawkins, Q.C., on a former day in this term, obtained a rule nisi to enter a verdict for the defendants or a nonsuit, on the grounds,—first, that there was no proof of any such negligence as alleged,—secondly, that there was no evidence to justify the finding of the jury; or for a new trial on the ground that the verdict was against evidence.

Huddleston, Q.C., and *H. James*, shewed cause. The only question is whether there was any evidence of negligence which the learned judge was warranted in leaving to the jury: if there was, the matter is disposed of by their finding that the company had not provided reasonably sufficient accommodation for the public. Two witnesses were called on behalf of the plaintiff, one of whom

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was a builder, and both stated that they considered the staircase in question to be a dangerous one. The defendants called no witnesses. Under these circumstances, it can hardly be said that there was no evidence to go to the jury. The case very closely resembles *Longmore* v. *The Great Western Railway Company* (1), where the jury found a bridge over the railway, which had been erected ten years, and over which many thousand persons had passed safely, to be a dangerous structure, upon the opinion of two witnesses. The question was left to the jury there in almost identically the same terms as here: and the Court held that it was peculiarly a matter for the jury, and refused to disturb the verdict.

Hawkins, Q.C., and *Horace Lloyd*, in support of the rule. There clearly was no evidence of negligence to warrant the conclusion the jury came to. The stairs in question were ascending stairs, six feet wide, with a wall on each side. The traffic being very great, it was necessary for the safety of the public that the stairs should be made as durable as possible. The front part of the surface therefore was protected with brass, which is not an unusual thing to find on much-used staircases. The reason why the defendants called no witnesses to prove the staircase safe, was, that they thought the fact of so many persons having used it without accident was abundant evidence of the absence of danger: and they had no reason to expect that any one would have the hardihood to swear that it was dangerous. The evidence to charge the defendants in a case of this sort must, as is observed by Williams, J., in *Toomey* v. *The Brighton Railway Company* (2), be "evidence upon which the jury might reasonably and properly conclude that there was negligence." *Cornman* v. *The Eastern Counties Railway Company* (3) is also a strong authority that a railway company are not to be charged with negligence, unless it is shewn that they have omitted to perform some duty.

ERLE, C.J. I am of opinion that this rule should be made absolute, because I think there was no evidence to go to the jury of any actionable negligence on the part of the defendants.

(1) 19 C. B. (N.S.) 183. (2) 3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.
(3) 4 H. & N. 781; 29 L. J. (Ex.) 94.

There is a manifest distinction between the present case and that of *Longmore* v. *The Great Western Railway Company*. (1) With regard to the nature of the structure, it was an ordinary staircase, about six feet wide, with a wall on each side, the steps being of ordinary dimensions. There was nothing peculiarly dangerous in it, like the staircase in *Longmore's* case. It was said that brass was an improper thing for the surface of the stairs, and that lead would be better, because less slippery; but, in my judgment, that expression of opinion on the part of the witnesses affords no ground for holding the defendants liable. As to the absence of a hand-rail, I see nothing in the nature of the structure to make it the defendants' duty to provide one, though possibly it might be occasionally found convenient, as, by a man with a wooden leg, or a very infirm person. Besides, from the width of the staircase several persons must necessarily be going up together, and all could not avail themselves of the hand-rail, if there. Further, the plaintiff was shewn to have been in the habit of using this staircase for about eighteen months; and many thousand persons have used it without any accident having happened. The mere circumstance of the want of a hand-rail, and the use of brass instead of lead, does not afford a ground of action.

WILLES, J. I am of the same opinion. It was incumbent on the plaintiff to give reasonable evidence from which the jury would be warranted in concluding that the company had not furnished sufficient accommodation for access to and from the station. The real question was whether the staircase was defective and dangerous by reason of the nosings (as they are called) of brass, and the absence of a hand-rail. The only evidence as to the former was that of the witness (the builder) who said that lead would have been a safer material for the purpose, because less slippery. But we must take that evidence with the common experience which every one has. We all know that brass is a material which is commonly used for the nosing of stairs in public offices, steam-boats on the river, and other places of much resort. It is to be observed, also, that the plaintiff himself well knew the condition of the staircase in question, having gone up it daily for about eighteen months. Taking all the circumstances together,

(1) 19 C. B. (N.S.) 183.

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this seems to me to be nothing more than an attempt to dictate to the company, and make them cease to use a particular metal on their staircases, which is commonly used for the purpose, and which nobody has hitherto complained of. I think there was no evidence which could properly be left to the jury to shew that the company had been guilty of any negligence in the construction or maintenance of the staircase. I also think the case is very distinguishable from that of *Longmore* v. *The Great Western Railway Company*. (1) In that case the danger arose from the circumstance of a rail being placed at the side of some steps on the bridge, which apparently afforded protection to persons using the bridge, but which in reality afforded no protection whatever in the event of an accidental slip in ascending or descending; thus leaving a hole, which was a sort of concealed trap. Here, however, there was nothing improper or unusual in the construction of the staircase; nothing to cause danger to a person walking with ordinary circumspection. For these reasons, I think the rule should be made absolute to enter a nonsuit. That part of the rule which seeks for a new trial as for a verdict against evidence may be reserved, in order to abide any ulterior proceeding.

KEATING, J. I have felt some difficulty in seeing how this case is to be distinguished from *Longmore* v. *The Great Western Railway Company* (1); and I must confess that that difficulty is not quite removed. It is, however, only a question of degree. My Lord and my Brother Willes think there is a distinction, and I do not wish to dissent from their conclusion.

MONTAGUE SMITH, J. I agree with my Lord and my Brother Willes that a nonsuit should be entered. The line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to a jury. It is difficult in some cases to determine where the line is to be drawn; but here I have no hesitation in saying that there was no evidence of negligence which my Lord could properly leave to the jury. There was nothing unusual in the construction of the staircase. The use of brass for protecting the edges of the stairs, and the absence of a hand-rail, which alone were relied on by the plaintiff, are by no

(1) 19 C. B (N.S.) 183.

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means unusual in staircases of a similar description where the traffic is great. They were obvious to every one using the stairs, and were well known to the plaintiff himself. The plaintiff has no right to complain of the absence of accommodation of an unusual kind. The mere fact of the plaintiff having fallen and hurt himself is not sufficient to charge the company with negligence. *Longmore* v. *The Great Western Railway Company* (1) is obviously distinguishable. There, there was an aperture left at the side of the stairs of the bridge, which was undoubtedly dangerous; it was large enough to admit of a person accidentally slipping on the stairs falling through; and it was not an obvious danger. As to the suggestion of the witness that brass nosings were improper, and that lead would be more proper, that was a mere expression of opinion. Every case of this kind must be decided upon its own particular facts and its surrounding circumstances; and the Court is in an especial manner bound to see that the evidence submitted to the jury in order to establish negligence is sufficient and proper to go to them. I am clearly of opinion that there was no sufficient or proper evidence here, and that the rule to enter a nonsuit should be made absolute.

Rule absolute.

Attorney for plaintiff: *H. de Medina.*
Attorneys for defendants: *Burchells.*

SEAGRAVE *v.* THE UNION MARINE INSURANCE COMPANY.

Feb. 9.

Insurance—Insurable interest—Contract of sale—Amendment.

A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool (who sold as agents or brokers for D. & Co., of the same place), at prices which were settled at the beginning of each year, wrote to them on the 14th of February, ordering a shipment of 100 tons, provided freight did not exceed 6*s.* 6*d.* On the 26th, B. & Co. wrote in answer,—"We have succeeded in fixing the schooner Anne and Isabella to carry about 115 tons at your limit of 6*s.* 6*d.* per ton. We presume we value upon you at six months from the date of shipment at 10*l.* per ton," &c.; adding in a postscript, "Please say if you purpose effecting insurance at your end." On the 3rd of March, A. wrote,—"I am favoured with yours of 26th. You say we presume we charge you 10*l.* per ton net cash,

(1) 19 C. B. (N.S.) 183.

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&c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9*l.* 15*s.* net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; and, now that you are making some changes, it may be as well that I should know how we are to get on for the future;" and he concluded with a request that some flowering shrubs might be sent to him "in charge of the captain." On the same day, A., through Joyce, a broker, effected an insurance on the guano per Anne and Isabella for 1200*l.* *

The guano was shipped at Liverpool on the 4th of March, under a bill of lading making it deliverable "to B. & Co. or their assigns." The bill of lading (unindorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then at Belfast), who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday the 7th of March and informed him verbally of the shipment, to which he made no objection; and on the morning of Monday the 9th they went together to A.'s office, and there the bill of lading was indorsed and handed over with the invoice to A., who thereupon accepted a draft for the amount, which was afterwards satisfied. In the course of the Monday they heard for the first time that the Anne and Isabella with the guano on board had been lost on the Saturday night.

A. sued the underwriters on the policy effected by him, and recovered the sum insured, less 50*l.* which he failed to receive in consequence of the insolvency of one of the underwriters,—this Court holding upon that occasion, in conformity with the verdict, that the letters of the 14th and 26th of February and 3rd of March constituted a complete contract so as to pass the property in the guano to A. on its shipment.

An action was afterwards brought in the name of B. on the second policy, avowedly for the benefit of A., for the purpose of recovering the 50*l.*, and also certain expenses which he had been put to for extra costs, interest of money, &c., and which it was agreed should be together assessed at 200*l.*, if the underwriters on that policy were liable for anything.

In this second action, A. and B. both swore that the contract of sale was not complete until Monday the 9th. The learned judge told the jury, that, in his opinion (and in this the jury agreed with him), the letters did not constitute a contract, and that there was no complete contract so as to pass the property until after the loss: and he ruled, as matter of law, that B. had an insurable interest "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or assigns:"—

Held, a misdirection; there being no insurable interest in B.

And the Court refused, under the circumstances, to allow an amendment, by alleging the interest to be in D. & Co., B.'s principals.

THIS was an action upon a policy of insurance on guano, valued at 1150*l.*, on board the ship Anne and Isabella, from Liverpool to Londonderry, averring interest in the plaintiff George Seagrave only.

The defendants denied the making of the policy, and also that the plaintiff had an insurable interest in the guano.

The cause was tried before Martin, B., at the last Liverpool Assizes. The facts which appeared in evidence will be found amply detailed in the judgment. The correspondence there referred to was as follows:

February 14, 1863, M'Carter to Seagrave & Co.:—

"Gentlemen,—I duly received yours of the 11th instant, and feel obliged by your attention. I had 12 tons of your guano on hands, and will not require any more before 1st May; but, if it serves you in any way to ship 100 tons soon, payable on the above date, you may do so, providing freight does not exceed 6*s.* 6*d.*"

On the 26th of February, Seagrave & Co. replied as follows:—

"Dear Sir,—In accordance with your favour of 14th February, we have now the pleasure to inform you we have succeeded in fixing the Anne and Isabella, of Arbroath, to carry about 115 tons at your limit of 6*s.* 6*d.* per ton. We expect to have the cargo on board by the middle of next week. We presume we may value upon you at six months from the date of shipment, calculating it as a cash payment at the rate of 10*l.* per ton on the 1st May, *i.e.* charging you interest from this latter date till the due time of the bill.

"P.S. Please say if you purpose effecting insurance at your end."

March 3rd, M'Carter to Seagrave & Co.:

"Gentlemen,—I am favoured with yours of 26th. You say, 'We presume we charge you 10*l.* per ton net cash on 1st May, and interest on draft from that date.' I really cannot understand this, when I know that Mr. Lawson supplies your guano in Scotland at 9*l.* 15*s.* net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions (1); and, now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry indeed to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you. I thank you for the mushroom-spawn. If your Mr. George

(1) This referred to an arrangement under which M'Carter had been in the habit of receiving from Seagrave & Co. a commission of 1¼ per cent. on all independent trade in the phospho-guano executed by them in the county of Londonderry.

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Seagrave could send me half a dozen nice flowering shrubs, including verbena, in charge of captain, I'll do as much for him."

On the part of the defendants, it was objected that the correspondence and the evidence shewed that the property in the guano had passed by the contract to M'Carter, and, if not, that the property in the guano was in Messrs. Dixon & Co., of Liverpool, for whom Seagrave & Co. were acting merely as agents, and, consequently, that the plaintiff had no insurable interest therein; and, further, that there was a material variance between the policy as set out in the declaration and the policy proved, in this, that the declaration alleged the insurance to be absolute and unqualified, whereas the policy contained the qualifying words following: "Such losses and damages thereinafter expressed as might happen to the subject-matter of the insurance, and might attach to the policy."

For the plaintiff it was submitted that, inasmuch as the correspondence shewed no complete contract between Seagrave & Co. and M'Carter, and the guano was by the bill of lading made deliverable at Londonderry to the "order of George Seagrave & Co., or to their assigns," the property in the cargo had not passed to M'Carter at the time of the loss, and, consequently, the insurable interest was in Seagrave & Co.

The learned judge said, that, if it were a question of law for him, upon the letters, he was prepared to hold that the property in the guano did not pass to M'Carter, and that the plaintiff had an insurable interest "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or assigns;" and he told the jury, that, upon M'Carter's evidence, it appeared to him clear that there was no contract before the 9th of March.

The jury adopted this view; and under the direction of the learned judge a verdict was entered for the plaintiff for 200*l*., which sum it was agreed that the plaintiff was entitled to if he could retain the verdict.

Temple, Q.C., in Hilary Term, obtained a rule nisi to arrest the judgment, on the ground of variance; and also for a new trial on the ground of misdirection and that there was no sufficient evi-

dence of an insurable interest in the plaintiff,—with liberty to the defendants, in the event of the rule being made absolute, to amend the pleadings in such manner as to the Court might seem right. He referred to *Lucena* v. *Craufurd.* (1)

Brett, Q.C., Mellish, Q.C., and *Potter,* shewed cause. There was no misdirection; and the evidence clearly warranted the verdict, without in the least degree impugning the decision of this Court in *Joyce* v. *Swann.* (2) It appears, as well from the evidence of the plaintiff as from that of M'Carter, that the contract for the sale of the guano was not complete at the time of the loss. The property, therefore, remained in Seagrave, to whom or to whose order the cargo was by the bill of lading made deliverable. The learned judge expressed a strong opinion upon the facts; but he left the case to the jury.

[WILLES, J. The Court, or some of them, on the former occasion, expressed an opinion that the fact of a contract existing was enough to give M'Carter an insurable interest, even though the property in the goods did not pass. But that was not the ground of the judgment.]

No doubt, if there had been a complete contract before the loss happened, M'Carter might have had an insurable interest, though something were still wanting to vest the property in the goods in him. It is plain, however, that the property was never intended to pass until the bill of exchange for the price was accepted and handed over. It was obviously for this purpose that the bill of lading gave Seagrave the control over the cargo. A factor intrusted to sell goods has a right, as incident to his employment as factor, to insure the goods in his own name: 1 *Arnould on Insurance,* s. 119, 2nd edit. p. 301; 1 *Phillips on Insurance,* s. 311, 3rd edit. p. 177. So, he may maintain trover for them. A trustee, who has no beneficial interest, or a guardian carrying on business for an infant, may insure in his own name. Besides, here, Seagrave would be at all events interested to the extent of the freight, for which he had rendered himself liable; the bill of lading giving him a remedy against the master.

[WILLES, J. Many great wharfingers hold general policies to cover the goods which they hold as trustees for others. But,

(1) 2 N. R. 269. (2) 17 C. B. (N.S.) 84.

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assuming that Seagrave had an interest, was not that satisfied by payment of the price of the goods?]

The bill was dishonoured, and never was fully paid. If the plaintiff here had any interest in respect of which he could insure, the amount is agreed upon. Assuming that there was no insurable interest in the plaintiff, the Court will not grant a new trial if the difficulty may be got over by an amendment, as, by inserting the names of Dixon & Co., Seagrave & Co.'s principals, as the persons on whose behalf the insurance was made.

[WILLES, J. If it had appeared that the plaintiff was suing for Dixon & Co., that might have been done. But confessedly the plaintiff is suing for the benefit of M'Carter. Such an amendment as that now suggested would be a departure from the bargain made at the trial, which was that the verdict should stand for 200*l.*, if the Court should think that there was any insurable interest in the plaintiff.]

If there was any evidence of that for the jury, the case is disposed of by their verdict. As to the alleged variance between the statement of the policy in the declaration and the policy itself, that was taken as amended at the trial, and the Court will amend now if it be necessary.

Temple, Q.C., *C. Russell*, and *Cohen*, in support of the rule. There was no insurable interest whatever in the plaintiff. The letters which passed between Seagrave & Co. and M'Carter constituted a complete contract so as to vest the property in the goods in the latter from the moment of shipment; the goods were appropriated, and the appropriation assented to. See *Blackburn on the Contract of Sale*, 126; *Sparks* v. *Marshall.* (1)

[WILLES, J., referred to *Richardson* v. *Dunn* (2) as confirmatory of that.]

The nature of an insurable interest was much discussed in *Lucena* v. *Crauford.* (3) Lord Eldon there says (4): "Since the 19 G. 2, c. 37, it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been

(1) 2 N. C. 761; 3 Scott, 172.
(2) 2 Q. B. 218.
(3) 2 N. R. 269.
(4) Page 321.

termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be *a right in the property, or a right derivable out of some contract about the property*, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party." Further on he says (1): "A trustee has a legal interest in the thing, and may therefore insure. So, a consignee has the power of selling; and the same may be said of an agent. I cannot agree to the doctrine said to be established in the courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract. There are different sorts of consignees. Some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal. But, in the present case, the commissioners (2) do not insure in respect of any benefit to themselves, nor of any benefit to the Crown, or to any other person or persons stated on this record; they insure merely as commissioners, and, if they have a right so to insure, it seems to me that any person who is directed to take goods into his warehouse may insure, and that there is nothing to prevent the West India Dock Company from insuring all the ships and goods which come to their docks." Here, the guano was the property of Dixon & Co., whose place of business was in Liverpool. It remained their property down to the time of shipment. Seagrave & Co. were merely the agents for putting it on board. The circumstance of their inserting their own names in the bill of lading as consignees amounts to nothing. If it be said that they had an interest by reason of the liability they incurred for the freight, the obvious answer is, that, if the goods arrived in safety at Londonderry, the freight would be earned, and the shipowner

(1) Page 324.

(2) Commissioners appointed by the government to take possession and dispose of Dutch prizes captured in anticipation of a war; who, after much litigation, were ultimately held to have an insurable interest, as trustees of the captured property, to its full value.

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would have a lien upon the cargo for it. The only person having an insurable interest was M'Carter, and this action confessedly is brought for his indemnity. If M'Carter had sued, the defendants might have pleaded satisfaction. The learned judge clearly misdirected the jury in telling them, as a matter of law, that the interest was in Seagrave. In *Duer on Insurance*, Vol. 2, lect. x., s. 9, p. 106, where the right of a consignee to insure is discussed, the learned author says: "It has never been decided that a mere consignee who has no interest, and no lien whatever on the goods consigned to him for sale, has the right to insure them on behalf of the consignor,—that the mere transmission of the bill of lading conveys the authority; and such a decision would be directly opposite to the understanding and practice of merchants, not only in England and in the United States, but, it is believed, in every part of commercial Europe. In the United States, a consignee who is not the owner, never insures unless by express direction, or when he has accepted bills or otherwise made advances on account of the consignment; and such, it appears from Benecke and other writers, is the general usage on the Continent of Europe." And in note ii, pp. 160 et seq., the learned judge comments, amongst others, upon the cases of *De Forest* v. *Fulton Insurance Company* (1); *Wolff* v. *Horncastle* (2); *Conway* v. *Gray* (3); *Carruthers* v. *Shedden* (4); *Fragano* v. *Long* (5); and *Lucena* v. *Craufurd*. (6) The subject is similarly treated in 1 *Arnould on Insurance*, 2nd edit. 167, and in 1 *Phillips on Insurance*, s. 309, p. 176. The facts bring this case clearly within the principle of *Morgan* v. *Price* (7) and *Bruce* v. *Jones*. (8)

WILLES, J. This case has been extremely well argued, and the Court will take time to consider.

Cur. adv. vult.

WILLES, J., Feb. 9, delivered the judgment of the Court:

This was an action upon an insurance of guano, valued at 1150*l*., on board the Anne and Isabella, from Liverpool to Londonderry.

(1) 1 Hall R. (American) 84.
(2) 1 B. & P. 316.
(3) 10 East, 536.
(4) 6 Taunt. 14; 1 Marsh. 416.
(5) 4 B. & C. 219; 6 D. & R. 283.
(6) 2 N. R. 269.
(7) 4 Ex. 615.
(8) 1 H. & C. 769; 32 L. J. (Ex.) 132.

The declaration averred interest in the plaintiff, George Seagrave, only. The pleas denied, first, the policy, upon which nothing turns; and, secondly, that the plaintiff had an insurable interest.

At the trial before Martin, B., at the last Winter Assizes at Liverpool, the plaintiff had a verdict for 200*l.* In the last term, the defendant obtained a rule for a new trial upon various grounds, which came on for argument at the sittings after term, before Keating and Montague Smith, JJ., and myself, when we took time to consider.

It appears, that, in the year 1864, M'Carter, of Londonderry, suing in the name of Joyce, recovered in this court against Swann and other underwriters upon an insurance upon the same cargo for the same voyage, the sum of 1200*l.*, of which he received 1150*l.* M'Carter's interest was alleged to be that of buyer of the guano before its loss from the now plaintiff's firm; so that one set of underwriters has already paid the whole amount at which the guano was valued and insured in the policy now sued upon.

The details were as follows:—Upon the 14th of February, 1863, M'Carter, who had from time to time bought guano of or through the now plaintiff's firm, wrote to them, stating that, if it suited them to ship soon 100 tons of guano at 6*s.* 6*d.* freight, to be paid for the 1st of May, they might do so. Upon the 26th of February, the plaintiff's firm wrote to M'Carter stating that they had engaged the Anne and Isabella to take about 115 tons at 6*s.* 6*d.*, and that they expected to have the cargo on board about the middle of the next week, and proposed to draw upon him for it at 10*l.* per ton. M'Carter must have made up his mind to take the cargo thus offered; for, he did not write to countermand it; and, upon the 2nd of March, he effected an insurance through one Joyce of this very cargo per Anne and Isabella for 1200*l.* Upon the 3rd, he wrote complaining that the price charged was 10*l.* a ton, when it was only 9*l.* 15*s.* net in Scotland, but not refusing it; on the contrary, stating that he expected the usual allowance, which was a matter of course. Upon the 4th of March, the cargo was shipped at Liverpool under a bill of lading making the goods deliverable "to the order of George Seagrave & Co. (the plaintiff's firm) or to their assigns." The invoice was made out the same

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day, describing the guano as "delivered to the account of M'Carter," according to the letter of the 26th of February. Then, the plaintiff's firm, having upon the 4th of March received the letter of the 3rd, effected with the present defendants the policy upon which this action is brought, upon the cargo, valued at 1150*l.*, to which extent from that time there were two insurances. The plaintiff at that time was at Belfast, and intended to visit Londonderry; and the invoice and bill of lading were forwarded to him, to be handed there to M'Carter. Upon the 7th of March, in the evening, the plaintiff arrived at M'Carter's private house upon a visit, and informed him of what had been done; to which M'Carter made no objection. Afterwards, upon that night, the ship and cargo were lost. Upon Monday, the 9th, before the loss was known, the plaintiff and M'Carter went to the office of the latter, and there, without more, the bill of lading was indorsed by the plaintiff, and handed to M'Carter, with the invoice; and he accepted a bill for the amount. They learnt of the loss the same day; but, so far as appears, neither did M'Carter ask to have back, nor did the plaintiff offer to return, the bill: indeed, that would have been inconsistent with all that had passed, and especially with M'Carter's tacit assent upon the Saturday evening, before the loss, and the payment upon the Monday accordingly. Further, upon hearing of the loss, M'Carter asked, not for his bill, but for the policy effected by the plaintiff, which the latter declined to give, and referred M'Carter to his own underwriters. Both parties, therefore, treated the purchase as being between themselves effectual and binding, which it could not have been unless complete before the loss. Accordingly, M'Carter brought the action in the name of Joyce against his underwriters; and, principally upon his own evidence, with that of the documents, but without calling the now plaintiff as a witness, he established in fact to the satisfaction of a London jury, under the direction of Erle, C.J., and afterwards in law to the satisfaction of this Court, that what the parties, buyer and sellers, had agreed to act upon was the true construction of the transaction, and that the sale was complete by the letter of the 26th of February, acted upon by the sellers by shipping on account of M'Carter, and by M'Carter by not rejecting the offer, by insuring upon the 2nd of

March (the goods being at his risk as well as on his account), by the letter of the 3rd of March which in this court was considered as a reluctant assent to take the cargo, by his assent and acquiescence upon the evening of the 7th of March, when Seagrave (the plaintiff) informed him of what had been done, by taking the bill of lading, and paying upon the 9th, without any new terms, shewing that the transaction was complete at latest upon the Saturday, and by acting upon the sale as valid after news of the loss. (1) The non-indorsement of the bill of lading before the loss did not, it is scarcely necessary to remark, exclude that conclusion: *Coxe* v. *Harden* (2); *Browne* v. *Hare*. (3) M'Carter, the buyer, thus obtained judgment for 1200*l.*, and he has been paid 1150*l.*, the whole amount at which the guano was valued in the policy now sued upon, and he paid the sellers as upon a successful adventure; so that the sellers got all they could have got if the cargo was safe, and thus both buyer and sellers were indemnified against any risk which was insured against by the defendants: and it might have been supposed that the insurers had heard the last of the matter.

It appears, however, that M'Carter was dissatisfied with the amount which he recovered in the name of Joyce, as to the following particulars detailed by him at the trial, viz. 50*l.* of the former verdict not paid,—49*l.* extra costs,—104*l.* difference between the interest which he recovered and the interest which he had to pay his own bankers, in order to raise money,—20*l.* travelling expenses, not alleged to have come within the suing and labouring clause, or to have had anything to do with the insurance.

The mass of these items was irrecoverable under any circumstances against the underwriters upon either policy; and no one of them could by any proceeding be justly claimed against the present defendants. M'Carter, however, took a different view of his rights; and it appears now plainly, that, by arrangement between him and the plaintiff, the present action was brought, in effect, to inforce payment of the enumerated items, though, under good advice, a verdict was not sought for the whole 1150*l.*,—a measure which if resorted to would, we believe, have so demonstrated the

(1) See *Joyce* v. *Swann*, 17 C. B. (N.S.) 84.

(2) 4 East, 211.

(3) 4 H. & N. 822; 29 L. J. (Ex.) 6.

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impropriety of the claim as to prevent the actual result of a verdict in the plaintiff's favour.

At the trial of this cause, the plaintiff's case was launched upon his own evidence, which was to the same effect as that given by M'Carter upon the trial of *Joyce* v. *Swann* (1), with these exceptions, —first, that, after the examination by counsel was over, in answer to a question put by the learned judge (being the question for decision), the plaintiff made the following statement: "I made the sale to M'Carter on the 9th,"—secondly, that the plaintiff stated, that, instead of being principal in the actual or intended sale, his firm were only commission-agents (not del credere) of Dixon & Co., of the same town. And, although the objection on the score of insurable interest was urged early in the case, the plaintiff's only account of his interest was, that his firm were brokers, not factors; nor did it appear that the guano ever was in their possession as bailees, nor that they had any lien. The evidence was quite bare upon this point; and it is consistent therewith that the guano went straight from the stores of Dixon & Co. to the ship, and that the name of the plaintiff's firm was put in the bill of lading in accordance with a not uncommon practice of brokers to carry on business in their own names, and not because they had any other interest in the transaction. And this appears to be the reasonable conclusion from the evidence of the plaintiff, who gave no further account of his interest than that he acted as broker and agent for Dixon & Co., coupled with the fact that he sought to recover nothing upon his own behalf, but all for M'Carter.

The last additional fact to which the plaintiff was examined, was, as to the payment of the bill given him for the price of the guano. At first he stated, "It has not been paid: 200*l.* or 300*l.* is still unsatisfied." "The bill has not been satisfied, to a considerable extent." "Messrs. Dixon have suffered a loss." But, upon cross-examination, he said, "M'Carter dishonoured the bill at first. It was satisfied by mutual arrangement. *We* were put to expense by the dishonour and delay,"—not, be it observed, by the loss of the goods.

Now, the only way of reconciling these contradictory statements,

(1) 17 C. B. (N.S.) 84.

is, to suppose that the 200*l.* or 300*l.* spoken of by the plaintiff represent the 200*l.* or 300*l.* made up of the items already enumerated as claimed by M'Carter, and which are, by agreement with M'Carter (who is probably a good customer), to be allowed or not allowed to him, according to the event of the present action.

Upon that evidence, without calling M'Carter, the plaintiff relied; whereupon certain objections were taken for the defendants, some of them founded upon mere formal variances, to which we attach no importance, and one which raises the main question, viz., that Dixon & Co., who had been indemnified by payment, and not the plaintiff, were the persons interested in the policy, and that the plaintiff had not proved any interest in the subject-matter of insurance.

The learned judge overruled these objections; and the defendants called M'Carter (the real plaintiff) as a witness. M'Carter, like the nominal plaintiff, gave evidence to the same effect as in the former cause of *Joyce* v. *Swann* (1), with these exceptions, that, after the examination by counsel was over, he, in answer to a question put by the learned judge (being the question for decision), made the following statement, viz.: "The purchase by me was on the Monday morning, the 9th." As to the bill in payment of the guano, M'Carter stated: "It is paid or satisfied." As to the items of claim already set forth, he added: "*I expect to be made good this loss out of the policy now sued on.*"

Such being the evidence, the learned judge told the jury that, upon M'Carter's evidence, it appeared to him clear that there was no contract before the 9th of March, at Londonderry, after the goods were lost; and upon that point he took the opinion of the jury, who adopted this direction, and found a verdict for the plaintiff. No other question was left to them.

With respect to the point of insurable interest, the learned judge ruled as matter of law that the plaintiff had an insurable interest, "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or assigns."

The damages were agreed at 200*l.* (representing the items already mentioned, or some of them), in the event of the plaintiff being entitled to retain the verdict.

(1) 17 C. B. (N.S.) 84.

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In the last term, a rule was obtained for a new trial upon several grounds, amongst others a miscarriage, in that the learned judge ruled as matter of law that the plaintiff had an insurable interest; and, the matter having been fully argued, and time taken to consider, we are of opinion that the rule for a new trial ought to be made absolute.

In considering the case, three prominent points present themselves,—first, that both M'Carter's and the plaintiff's policies were for the value of the guano only, and not for such extras as M'Carter detailed in evidence,—secondly, that this action is for M'Carter's benefit,—thirdly, that M'Carter has already received from his underwriters, through Joyce, the whole amount at which the goods are valued in the plaintiff's policy.

It was argued, therefore, that, according to the case of *Bruce* v. *Jones* (1), there was a complete answer to any further claim. We need not, however, consider this further at present, as there is no plea to raise the question, and, if such a plea be added, it may, if necessary, be discussed upon a future occasion.

Next, it appears that the direction of the learned judge in point of law, and the finding of the jury in pursuance of that direction, are in conflict with the verdict in *Joyce* v. *Swann* (2), and the judgment of this Court thereupon, of which verdict and judgment M'Carter has already reaped, and now retains, the benefit. Nor was the evidence as to the question upon which the verdict passed substantially different from what was offered upon the trial of the former action, save in the answers given to the mixed questions of law and reasoning upon facts proposed to the nominal and to the real plaintiff, and which was the very question to be decided by the Court. Whether such a result can be deemed satisfactory it is at present unnecessary to consider; and the rule hardly raises the point with sufficient distinctness as an objection to the verdict.

Thirdly, and lastly, the report of the learned judge is distinct, that he thought "the plaintiff had an insurable interest as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or his assigns." In this statement of law, we are, after much consideration, unable to concur. In point of fact, the now verdict finds that the plaintiff was not

(1) 1 H. & C. 769; 32 L. J. (Ex.) 132. (2) 17 C. B. (N.S.) 84.

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"vendor," because it finds that there was no valid sale, and no sale until after the loss. In point of fact, also, the evidence of the plaintiff and of M'Carter shews that payment was made by bill, which has been paid or settled; so that, if the plaintiff was a vendor, he was not an "unpaid vendor." This ground failing, and with it the argument that there might be an interest in respect of commission which probably, like the price, was settled between the parties as upon a valid sale, it remains to consider what is the effect of the plaintiff being named as shipper and consignee in the bill of lading.

That this as matter of fact is primâ facie evidence of interest, we entertain no doubt: but the question is, whether as matter of law it is conclusive that there is an interest, even though the facts should shew that the nominal shipper and consignee is a mere agent, having no lien upon the goods for advances, commission, or otherwise, nor the possession or custody of them as carrier, factor, warehouseman, or other bailee, nor any liability to account for their loss by the perils insured against,—such as sustained the insurance by a carrier, *Crowley* v. *Cohen* (1); by a warehouseman declaring himself a trustee, *Waters* v. *Monarch Life Assurance Company* (2); a bankrupt or insolvent in possession of after-acquired property by permission of his assignees, *Marks* v. *Hamilton* (3); a ship-carpenter having a lien for repairs, *Tasker* v. *Scott* (4); a person having an equitable assignment, *Wilson* v. *Martin*. (5) The evidence did not bring the plaintiff within any of these categories; and the loss which took place was a loss of the goods to the intended seller or the intended buyer, according as the sale was complete or not, and not a loss to the mere intermediate agents.

It was argued that the liability for freight as shipper made an interest; but, by the loss of the goods on the way, the freight was also lost; and, if the goods had arrived, the interest was in the ship-owner's enforcing his lien, not in the goods themselves.

It was further argued that the bill of lading gave a remedy against the master, and was as against him an estoppel; but, even

(1) 3 B. & Ad. 478.
(2) 5 E. & B. 870; 25 L. J. (Q.B.) 102.
(3) 7 Ex. 323; 21 L. J. (Ex.) 109.
(4) 6 Taunt. 234; 1 Marsh. 556.
(5) 11 Ex. 684; 25 L. J. (Ex.) 217.

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as against the master, the bill of lading was not conclusive, if Dixon & Co. chose to interfere, and to insist upon delivery to them; and such delivery would have been an answer to any claim by the plaintiff, as was decided in the case of *Sheridan* v. *The New Quay Company*. (1)

7 C.B. 29.

The persons, if any, interested in the policy were Dixon & Co., and not the plaintiff. The property was theirs. The temporary possession of it was that of the ship's master, as bailee; the plaintiff, if there was a valid sale, was interested at the outside to the extent of his commission, if it was at risk, which it was not, for it was earned by the fact of sale, and there would be no lien for it against the buyer; and, if there was no valid sale, he was a mere agent, who had suffered nothing, and incurred no liability by the loss, for he had discharged his functions, save that he held the shipping documents subject to the orders of his employers.

We are not aware that it has ever been held that a mere agent, without possession or lien, has an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal; and the general rule is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured.

We are, therefore, after much consideration, of opinion that the learned judge was wrong in ruling as matter of law, even on the state of facts found by the jury, that there was an insurable interest in the plaintiff.

We were asked to amend the declaration by inserting a statement of interest in Dixon & Co.: and, undoubtedly, if Dixon & Co. had sustained a loss, they might have adopted and recovered upon this policy: but we are of opinion that no such amendment ought to be allowed in this case, because the action is in our judgment brought for M'Carter, not for Dixon & Co., who have been paid, and such an amendment might tend to frustrate, and could not tend to promote, the decision of the question which this action was brought to try.

As to the formal objections raised to the declaration, they may be cured by amendment if and when the plaintiff thinks it worth while.

(1) 4 C. B. (N.S.) 618; 28 L. J. (C.P.) 58.

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We give the defendant leave to add a plea or pleas, within eight days, upon condition that the plaintiff may within eight days thereafter enter a stet processus and cancel the policy.

For these reasons, and with these directions, the rule for a new trial is made absolute: and we hope we are not outstepping our province if we add a suggestion, that, in the event of the matters of law decided by the Court upon this or the former occasion being again contested by either party, the more convenient course will be that such party should be put to raise his objection by bill of exceptions, and thus obtain the benefit of reviewing our decision before a superior tribunal.

Rule absolute.

Attorneys for plaintiff: *Upton, Johnson, & Upton.*
Attorneys for defendants: *Field & Roscoe.*

STINSON, APPELLANT; BROWNING, RESPONDENT.

Feb. 9.

Nuisance—Highway Act, 5 & 6 Wm. 4, c. 50, s. 72—Lighting fires by the side of the highway.

A fire lighted by a wheelwright for the purposes of his business, within 50 feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the outside of the premises, is not a public nuisance within the prohibition of the 72nd section of the Highway Act, 5 & 6 Wm. 4, c. 50.

CASE stated under 20 & 21 Vict. c. 43.

Upon an information preferred by H. C. Browning, one of the clerks of the Redditch Highway Board, against George Stinson, for having made or assisted in making a certain fire within fifty feet of the centre of a public carriage-way or cart-way in the parish of Alvechurch, in the county of Worcester, in violation of the 72nd section of the General Highway Act, 5 & 6 Wm. 4, c. 50, it was proved on the part of the complainant, that, on the 10th of November, 1865, and within fifty feet of the centre of a certain highway in the parish called Ickneild Street, viz., about ten feet six inches from the centre of such highway, the defendant made a fire, and afterwards threw an apron-full of wood thereon, the road at the point where the fire was made being only twenty-one feet wide.

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On cross-examination it was proved that the road was not much used by the public; that the defendant, when he made the fire, opened a lid in the wall, and put the fire in the fire-hole and closed the lid, the fire-hole being on the defendant's premises; and that the business of a wheelwright, for which purpose the fire was used, had been carried on at the defendant's premises for twenty years and upwards.

It was contended by the defendant's attorney that the statute under which the proceeding was taken had reference only to fires made by hawkers, higglers, gipsies, and other persons travelling on the road, and not to the case of a fire made on the side of the highway by a person for the purpose of his trade, as here.

The magistrates adjudged and determined that the defendant did, on the day named in the information, make a fire in a fire-hole attached to the outside of his premises, for the purpose of his business of a wheelwright, within fifty feet of the centre of the said highway called Ickneild Street, and which fire was so exposed to the highway as to be in their opinion within the meaning of the statute; and they accordingly convicted him in the penalty of 1*s.*, and 1*l.* 5*s.* 6*d.* costs, with the alternative of seven days imprisonment.

The question for the opinion of the Court was, whether the making of the fire by the defendant as above described was a nuisance within the 72nd section of the Highway Act.

H. Matthews, for the appellant. The question turns upon the construction of the 72nd section of the General Highway Act, 5 & 6 Wm. 4, c. 50, which enacts that, "if any person shall wilfully ride on any footpath," or do certain other things on the highway, to the annoyance of any passenger, "or if any hawker, higgler, gipsy, or other person travelling, shall pitch any tent, booth, stall, or stand, or encamp upon any part of any highway, or *if any person shall make or assist in making any fire*, or shall wantonly fire off any gun or pistol, or shall set fire to or wantonly let off or throw any squib, rocket, serpent, or other fire-work whatsoever, within fifty feet of the centre of such carriage-way or cart-way, or bait any bull, &c., or lay any timber, rubbish, &c., upon such highway, to the injury of such highway, or to the

injury, interruption, or personal danger of any person travelling thereon," every person so offending shall forfeit not exceeding 40*s.* over and above the damages occasioned thereby. These words, it is submitted, must be qualified. They were evidently aimed at such nuisances committed on the highway as might enure to the injury of the highway itself, or cause danger or annoyance to passengers. If the enactment applied to a fire like that described in the case, it might with equal propriety be held to apply to a fire in a room within the prescribed distance from the centre of the highway. Some light is thrown upon the matter by the 121st section of the General Turnpike Act, 3 G. 4, c. 126, which imposes a similar penalty for all the offences enumerated in the clause now under consideration, but which has words which are omitted here,—" or if any blacksmith or other person occupying a blacksmith's shop situate near any turnpike-road, and having a window or windows fronting the said road, shall not by good and close shutters, every evening after it becomes twilight, bar and prevent the light from such shop shining into or upon the said road; or if any person shall make or assist in making any fire or fires, commonly called bonfires, within eighty feet of the centre of such road," &c. That was evidently the sort of nuisance by fire which the 5 & 6 Wm. 4, c. 50, s. 72, was aimed at.

No one was instructed on the part of the respondent.

WILLES, J. I am of opinion that the decision of the magistrates in this case was wrong. Taking into consideration all the various offences which are enumerated in the 72nd section, the reasonable and grammatical construction of it appears to me to be, that, to constitute the act done an offence within it, it must be shewn that some injury is done to the highway, or some danger or annoyance occasioned to passengers using it. The magistrates not having found that to be the case here, their conviction cannot be supported. I do not, however, think that this is a case for costs.

KEATING, J., and MONTAGUE SMITH, J., concurred.

Conviction reversed, without costs.

Attorneys for appellant: *White & Son.*

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Feb. 10.

PEACHE, Appellant; COLMAN, Respondent.

Alehouse—Sale of fermented or distilled liquors within the prohibited hours on Sunday—"Traveller"—11 & 12 Vict. c. 49.

Where a licensed victualler has opened his house on Sunday within the prohibited hours for the bonâ fide supply of refreshment to travellers arriving at an adjacent railway station, the mere fact that refreshment has been supplied to persons residing within a mile of the house, and who did not come by the train, will not justify a conviction under the 11 & 12 Vict. c. 49, s. 1.

Case stated under 20 & 21 Vict. c. 43.

The appellant was charged under the 11 & 12 Vict. c. 49, s. 1, for that he, "being the resident holder and occupier of a dwelling-house and premises in the parish of Sevenoaks, in the county of Kent, and being a licensed victualler duly licensed to sell wine, spirits, and other fermented and distilled liquors on the said premises, did open his said house on Sunday, the 4th of June last, for the sale of wine, spirits, and other fermented and distilled liquors, before the hour of half past twelve on the same day, to wit, at the hour of half past eleven, the same not being for refreshment to any traveller or to any lodger in the said house," contrary to the statute, &c.

The evidence was set out as follows:

Thomas Fone, a witness on the part of the informant stated,—"I am a constable in the Kent county constabulary. On the 4th of June last, a Sunday, I visited the Railway Tavern alehouse kept by Peache, about twenty-five minutes to twelve in the morning. I found several persons there smoking and drinking. I asked Mr. Peache how his house came to be open at that hour, and Sevenoaks people drinking and eating. I saw some Sevenoaks people there. One, a man of the name of Budgen, and his son, and another by the name of Morgan, and another elderly person. I did not know his name. I called Peache's attention to him, and said 'You do not call him a traveller,' and he replied, 'Oh yes, he does not belong to Sevenoaks.' I saw the persons mentioned leave the house. The elderly person was in the parlour sitting down, smoking. I left him there when I left. I spoke to Mr. Peache, and he said he was not aware that any Sevenoaks

people had been in the house. I asked him 'What are those that have just gone out?' He said he did not know; he could not tell everybody."

On cross-examination by the appellant's attorney, the witness said: "Mr. Peache's house is just outside the gates of the railway station. There were eighteen persons, I should say, in the house. I saw no one eating bread and cheese. I only went into the parlour. I know there are excursion trains on a Sunday. Three quarters of an hour before, a train had come in."

In reply to a question by the magistrates' clerk, the witness said: "Before the parties came away, I saw Morgan drink ale; and I saw all the other men in the house."

The appellant's attorney admitted that the elderly person referred to in Fone's evidence was a Sevenoaks person, who had gone to meet a friend coming by the rail; and he submitted that such a person was entitled to be at the appellant's house, as described.

On the part of the appellant, John Steers was called. He said: "I live at Sevenoaks. I recollect the 4th of June, Whit-Sunday. I was at Mr. Peache's house on the morning of that day. My father came from Tunbridge; and he and I went down to the train to meet my brother and his wife, who were coming from London. The train was late. It got in about 11.15, and there were a good many passengers. When we got to Mr. Peache's, my brother said he should like a glass of ale; and I and my father drank a glass of ale with him. He called for it. I said 'He is a traveller,—I must not drink it, but you may.'"

This witness, on cross-examination, said: "I saw no one that I knew. My father must pass my house before he gets to the railway station."

It was contended on the part of the appellant that he had committed no offence; that it was impossible he could personally see all parties who flocked to his house on the arrival of trains; and that he had, as he believed, supplied refreshment to those persons only whom he believed to be bonâ fide travellers, on the Sunday in question; that it was a common occurrence for parties in the neighbourhood to come to his house with friends who had come in by the train, and whom such parties had gone to meet; but that,

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on such occasions, he did not supply such parties, but only their friends, with refreshments.

The question for the opinion of the Court was, whether the appellant had committed an offence against the statute, and was rightly convicted of keeping his house open for the sale of wine &c. before the hour of half past twelve on the Sunday in question, under the circumstances detailed in the evidence.

The railway station is about a mile distant from Sevenoaks town, where Budgen, the person referred to in Fone's evidence, resides. Sunday, the 4th of June, was Whit-Sunday; and on that morning a great number of persons came to the Sevenoaks station by the train.

Hayes, Serjt., for the appellant. The statute specifies two distinct offences. It prohibits the opening of his house by a licensed victualler for the sale of liquors, or the sale of liquors before half-past twelve o'clock on the Sunday morning, except as refreshment for travellers. The charge against the appellant here is, opening his house for the sale of liquors before the prescribed time, not being for refreshment to any traveller. The question is whether the evidence shews that he did open his house otherwise than for the accommodation of travellers. The last case upon the subject, *Taylor* v. *Humphries* (1), puts the matter upon a very clear footing. It was there held, after much consideration, that, as the exception of "refreshment for travellers" is contained in the clause creating the prohibition, the burthen of shewing that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer; and that, if the innkeeper believes, and has reason to believe (of which the magistrates are the judges), when he supplies the liquor, that he is supplying refreshment for a "traveller," he ought not to be convicted. If the matter be left in doubt, the accused is entitled to the benefit of the doubt. The fair inference from the evidence here, it is submitted, is, that the appellant did not knowingly infringe the statute. There was no evidence that he knew that any of the persons supplied with ale were Sevenoaks people; and, if they were, Sevenoaks people may still be travellers. In *Fisher* v.

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

Howard (1), it was held that a person who has taken a ticket at a railway station, and is about to start by a train from that station, is a "traveller" within the exception in the 42nd section of the 2 & 3 Vict. c. 47, and the keeper of a refreshment-room at the station is not liable to be convicted under that section for opening his house for the sale of beer, &c., within the prohibited hours.

No one appeared for the respondent.

WILLES, J. This is a conviction of a licensed victualler on the 11 & 12 Vict. c. 49, s. 1, for opening his house on Sunday for the sale of wine, spirits, &c., before half-past twelve, "the same not being for refreshment to any traveller." It appears that the appellant did on Whit-Sunday open his house for the sale of liquors before the hour mentioned; and it would seem that there were twenty-one persons there, of whom eighteen were travellers, one other was smoking, and the other two were persons named Budgen, who lived at Sevenoaks, about a mile distant from the house. As to these two last-mentioned persons, the appellant admitted that he knew them to be Sevenoaks people, but he added that he did not know that any drink had been supplied to them. Probably they went away when the witness Fone presented himself, because they were conscious that they ought not to have been drinking there. The only proof that it was known to the landlord that they were in the house under circumstances which did not entitle them to be supplied with refreshment, is to be found in his own statement. The question is raised in a very peculiar form. The magistrates do not pronounce an opinion that the landlord did know that liquor was supplied to Sevenoaks men who were not travellers. Probably they felt that the reasonable conclusion from the evidence was, that the appellant did open his house for the supply of refreshment to travellers only, but thought they were bound to convict him because persons other than travellers were found in the house. Be that as it may, the question they put to us is, whether, under the circumstances detailed in the evidence, the appellant was rightly convicted of keeping his house open for the sale of wine, &c., before the proper time. I should have thought the true question was whether,

(1) 34 L. J. (M.C.) 42.

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under the circumstances, the magistrates were bound to convict the party. I think, on the facts here stated, they were not so bound, and consequently that the decision should be reversed.

KEATING, J. I am of the same opinion, and for the same reasons.

5 C.B. 493.

MONTAGUE SMITH, J. I am of the same opinion. Upon the evidence set out in the case, I cannot see that the appellant opened his house otherwise than for the accommodation of travellers, or knowingly supplied liquor to any other than a traveller. For anything that appeared to him, these persons may all have arrived by the train; or it may be that some of them had come from Sevenoaks to meet friends whom they expected to arrive by the train. I think they might equally be treated as travellers in the latter case, and that it would be very hard if, under such circumstances, they could not be supplied with refreshment.

Decision reversed.

Attorneys for appellant: *Sole, Turner, & Turner.*

GREAT WESTERN RAILWAY COMPANY, APPELLANTS; REDMAYNE, RESPONDENT.

1866.
Jan. 25.

Carrier—Damages, measure of—Market value

The plaintiff sent goods from Manchester by the defendants' railway to his traveller at Cardiff, the delivery of the goods was, through the negligence of the defendants, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff:—

Held, that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay.

THIS was an appeal from the County Court of Lancashire.

At the trial it appeared that the plaintiff was a clothier at Manchester, and sent a parcel of goods by the defendants' railway to his traveller at Cardiff. The parcel was delayed through the negligence of the defendants, and the traveller, after waiting two days beyond his usual time, left before it was delivered, and the goods were consequently not sold but forwarded, instead of a fresh parcel, to the traveller at the next town he visited. No notice had been given to the defendants of the object for which the goods were sent. The County Court judge having decided in favour of the plaintiff, and included in the damages the profits which the plaintiff would have probably made by the sale of the goods at Cardiff, the defendants appealed against this decision.

T. J. Clark and *J. Digby*, for the defendants.

It is clear that the profits of a particular contract cannot be recovered: *Borries* v. *Hutchinson* (1); *Hadley* v. *Baxendale*. (2) The true measure of damages is the difference between the market value of the article on the day on which it should have been delivered, and its market value on the day on which it is delivered: *Collard* v. *London and South Eastern Railway Company* (3); *Wilson* v. *Lancashire and Yorkshire Railway Company* (4); and it is admitted there was no such difference in this case.

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) 7 H. & N. 79; 30 L. J. (Ex.) 393.
(4) 9 C. B. (N.S.) 632; 30 L. J. (C. P.) 232.

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Pope, for the respondent. The market value is the value of the goods to the plaintiff for purposes of sale, and that in this case was diminished after the plaintiff's traveller had left by the amount of the profit that would have been gained by their sale. The profits that would have been gained may be included in the damages: *O'Hanlan* v. *Great Western Railway Company* (1); and in *Wilson* v. *Lancashire and Yorkshire Railway Company* (2), the loss of season lessened the value of the cloth to the plaintiff, but not intrinsically.

The Court (Erle, C.J., Willes, Keating, and Montague Smith, JJ.) held that the market value of the goods was their value in the market independently of any circumstances peculiar to the plaintiff, and that the profits that would have been made by the sale of the goods at Cardiff through the plaintiff's traveller being present could not be recovered.

The amount of the verdict was reduced accordingly by consent.

Attorneys for appellants: *Young, Maples, Teesdale, & Young.*
Attorney for respondent: *J. C. Needham, Manchester.*

(1) 34 L. J. (Q. B.) 154.
(2) 9 C. B. (N. S.) 632; 30 L. J. (C. P.) 232.

BERRY *v.* DA COSTA.

1866
Jan. 13.

Breach of promise of marriage—Excessive damages—Affidavit of defendant on motion for a new trial.

Upon a motion for a new trial, in an action for breach of promise of marriage, on the ground that the damages are excessive,—*semble*, that the Court will not receive the affidavit of the defendant, for the purpose of explaining or contradicting the evidence given at the trial.

In such a case, where the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating the damages, they are at liberty to take into their consideration the altered social position of the plaintiff in relation to her home and family, through the defendant's conduct towards her.

THIS was an action for breach of promise of marriage.

At the trial before Erle, C.J., at the sittings at Westminster after the last term, the facts proved were as follows:—The plaintiff, a young person who resided with her mother, a milliner and lace maker at Notting Hill, having casually met the defendant, who was described as a gentleman of considerable fortune, had, without very much solicitation, but under a distinct promise of marriage, left her mother's home, and resided at several different lodgings with the defendant, and ultimately went with him to Paris under pretence that the marriage was to take place there. Eventually the plaintiff was cast off, and the defendant married another woman.

A good deal of evidence was called on the part of the defendant to shew that the young lady's conduct was the reverse of respectable; and attempts were made to discredit the character of one of the parties at whose house she had lodged with the defendant; but these failed.

In his summing-up, the Chief Justice told the jury, that—the promise and breach being proved—the plaintiff was entitled to compensation in damages, not only for the loss of an advantageous settlement in life, but also for the degradation and misery which had resulted to her from the defendant's conduct. He also made some remarks about the dishonour brought upon her family by his conduct.

The jury, after some consideration, returned a verdict for the plaintiff with 2500*l.* damages.

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Huddleston, Q.C., moved for a new trial on the ground of misdirection and that the damages were excessive. On the first ground he submitted that the learned judge was wrong in leading the jury to believe that they were at liberty to give the plaintiff damages for the desolation brought upon her home and dishonour upon her family by the acts of a seducer; and that he ought to have told them that the damages were to be measured by the loss the plaintiff herself had sustained by the defendant's breach of promise,—the loss of an advantageous settlement in life. He referred to *Toulmin* v. *Hedley* (1) to shew that the Court will grant a new trial for misdirection, though they should think the direction in terms correct, if the direction was such that it might have been misunderstood by the jury. As to the damages, he submitted that they were clearly vindictive and under the circumstances outrageously excessive; the jury probably being influenced by the course which the learned counsel had been instructed to take at the trial, and also being misled by the exaggerated statement made at the trial as to the defendant's means. He also proposed to read an affidavit of the defendant. Upon a doubt expressed by the Court as to the propriety of receiving an affidavit of the party in such a case, the learned counsel referred to *Hawker* v. *Seale* (2), where this Court, notwithstanding the 14 & 15 Vict. c. 99, s. 4. (3) in an action of crim. con., received an affidavit of the defendant, denying that he had ever had criminal intercourse with the plaintiff's wife.

[ERLE, C.J. The Court will determine the admissibility of the affidavit, if it should become material. In the meantime its contents may be stated.]

The affidavit alleged that the defendant was not the seducer of the plaintiff, and detailed the circumstances attending their first meeting; and it further alleged that the defendant's income did

(1) 2 Car. & K. 157.

(2) 17 C. B. 595.

(3) That was a motion on the ground of *surprize*, where the affidavit of the party was always required. In *Smith* v. *Woodfine*, 1 C. B. (N.S.) 660, the defendant's affidavit was received for the purpose of pledging himself to the bona fides of the application, but not for the purpose of explaining or contradicting the evidence given at the trial. And see *Ling* v. *Croker*, 2 C. B. (N.S.) 760, where the Court declined to receive the affidavit of the plaintiff's wife in a similar case.

not exceed 700*l.* per annum, and that in the greater part of it the defendant had only a life interest.

WILLES, J. A rule is asked for in this case upon two grounds,—first, that my Lord misdirected the jury,—secondly, that the damages are excessive. I am of opinion that there was no misdirection. I apprehend, that, in ascertaining the proper amount of damages in an action for a breach of promise of marriage, the jury are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into their consideration the injured feelings and wounded pride of a woman to whom such a wrong has been done. This has been so often laid down, that I will content myself with referring to a modern instance, the case of *Smith* v. *Woodfine* (1), in this court, where all the authorities upon the subject are cited and considered. The supposed misdirection consisted in the Lord Chief Justice's pointing out to the jury the contrast between the former position of the plaintiff as the daughter of an honest and respectable mother, and her present degraded condition as the defendant's cast-off mistress, and telling them that they might take that into their consideration in assessing the damages. It is impossible that the jury could have understood him to mean that they were to add to those damages a solatium for the outraged feelings of the mother and family of the plaintiff. If that had been the fair result of the summing-up, undoubtedly it would have been a misdirection. The jury would have no right to consider that. The summing-up amounts to this,—that the damages which the plaintiff was entitled to, were, not merely the loss she sustained in not becoming the wife of a gentleman of property, but that she was also entitled to be compensated for the aggravation of that loss by reason of her prospects of marrying another being materially lessened. I put this in the driest language I can select. My Lord, no doubt, further intended to intimate to the jury that in estimating the amount of compensation due to the plaintiff for her injured feelings and wounded pride, they might legitimately take into their consideration the position of a young girl who had sustained an injury such as this defendant had inflicted upon the plaintiff,

(1) 1 C. B. (N.S.) 660.

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in returning to her mother's house, not as a virtuous and respected member of the family, but compelled as it were to skulk into the home she had made desolate, without daring to lift her eyes to her parent's face. I use the word "injury" throughout, because the mode of estimating the damages in cases of this sort stands upon a totally different footing from that which obtains in the case of a breach of an ordinary contract to deliver or to accept goods. Then, as to the amount of damages,—the Court is called upon to exercise an exceedingly nice jurisdiction, and to interfere with that which is the peculiar and exclusive province of the jury so long as they are not misled by prejudice or gross mistake, or misconduct themselves. For that also I refer to *Smith* v. *Woodfine*. (1) The jury there gave 3000*l*. damages; the motion took very much the same course as the motion has taken upon the present occasion; and the Court lay it down that they will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. It is not suggested that there has been any error or misconception on the part of the jury here, or that they have been influenced by any undue motives. The facts were all before them, and it was for them to pronounce their opinion upon them. It is suggested as a ground of misconduct on the part of the jury, that the damages they have given are, upon a view of all the circumstances, outrageously excessive and disproportioned to the justice of the case. We are not called upon to say whether or not we, if sitting in the place of the jury, would have awarded so much, or whether the substantial justice of the case would not in our opinion have been satisfied by a somewhat less amount. But we cannot shut our eyes to the fact that not only has the plaintiff lost the opportunity of marrying a gentleman in a position of life far superior to her own, and been deprived by the loss of her virtue of the opportunity of contracting a happy marriage with another man, but by the course taken at the trial imputations upon her character were unsparingly showered upon her. Indeed, every endeavour seems to have been made to shield the defendant by heaping charges and insinuations upon every one. Having chosen to take that

(1) 1 C. B. (N.S.) 660.

course, I think it is not competent to the defendant now to complain that the jury have given a larger amount of compensation than they probably would have given if a different course had been pursued. I must own I think it was a case for very considerable damages; and I cannot say what the amount should have been, though the amount given is perhaps more than I should have felt disposed to give. Upon the whole, however, I see no ground upon which we can properly interfere.

KEATING, J. I am quite of the same opinion. As to the alleged misdirection, I entirely agree in the view of my Brother Willes respecting the observations of the Chief Justice; and it seems to me to be impossible that the jury could have been misled by them, because he had before in clear terms laid down the true rule for the estimate of damages, and he repeated it again after the expressions objected to. Taking it all together, it was quite impossible for the jury to be led by them to suppose that they might give the plaintiff damages for the grief and discomfort brought upon her mother and the other part of her family by the conduct of the defendant towards her. I also entirely agree as to what are the proper functions of the Court in dealing with the amount of the damages. Without saying what I should have done if I had been a juryman, I must confess I think the damages here were measured upon a very liberal scale,—aggravated, no doubt, by the injudicious line of defence. I cannot, however, say that they are so excessive as to justify us in interfering upon that ground.

MONTAGUE SMITH, J. I am of the same opinion. For the reasons already given by my two learned Brothers, I think there was nothing in my Lord's summing-up which can be called misdirection. As to the damages, I entirely agree that the discretion of the Court in interfering to disturb the verdict on the ground that the jury have given excessive damages, is one which is to be exercised with extreme care. In commercial cases there is something like a standard by which the Court may judge of the propriety of the amount given. But in cases of this sort, it is peculiarly the province of the jury to say from all the surrounding circumstances what compensation the injured party is entitled to receive. It is quite impossible to analyze the elements of their verdict. The jury are clearly entitled to take into their consideration the

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wounded feelings and the altered social position of the plaintiff, and also the condition in life of the defendant. There was evidence that he was a person of considerable property; and it was suggested that he had large expectations. He might have shewn at the trial what his means really were: and even now, when he makes an affidavit, and has had an opportunity of curing the omission, he has not availed himself of it. As to the observation that the jury were probably angry at the cross-examination of the plaintiff's witnesses and the general line of the defence, all I can say is, that we have no means of entering into the minds of the jury and seeing how much of the sum awarded is attributable to that sort of feeling. But I can well understand, that, as the imputations sought to be cast upon some of the witnesses failed, the jury might well have come to the conclusion that the imputations upon the plaintiff were false also. Without, therefore, saying what I should, if exercising my own unbiassed judgment upon the matter, have considered a sufficient compensation for the defendant's breach of promise, I do not see enough to warrant me in interfering with the verdict of the jury.

Rule refused.

Attorney for defendant: *Hanrott.*

Jan. 12. MALPAS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Contract—Parol evidence—Carrier.

A., by parol, made arrangements with the defendants, a railway company, to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.:—

Held, that parol evidence was admissible to shew that the defendants had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract.

Jeffery v. *Walton* (1) remarked on.

DECLARATION against the defendants, as common carriers, for not delivering certain cattle of the plaintiff within a reasonable time. There was also a count in trover.

(1) 1 Stark 267.

The defendants pleaded the general issue; that the cattle were not delivered to them to be carried, as alleged; that they did deliver them within a reasonable time; and a special plea, that the cattle were carried under a special contract, by which they were to be carried at the plaintiff's risk.

It appeared at the trial, before Byles, J., at the Middlesex sittings in Michaelmas Term, 1865, that the plaintiff, wishing to send some cattle from Guilford to the market at Islington, had seen a clerk of the defendants at the Guilford station; and having ascertained from him that the cattle would be sent by the defendants' railway to their station at Nine Elms, and thence by the North London Railway to King's Cross, gave directions to the clerk that the cattle should be forwarded to the cattle station, York Road, King's Cross; and the clerk undertook that they should be forwarded at once. The clerk then filled up the following consignment note, which the plaintiff, without noticing the contents, signed.

"Reduced Rates.

"Cattle, Sheep and Pigs.

"To the South Western Railway Company, Guilford Station, 16th May, 1865.

"Receive from Malpas, of New Cattle Market, the undermentioned animals, on the conditions stated below, and at a special reduced charge below the rates authorized by law.

"To be sent to Nine Elms Station."

The cattle were sent to the Nine Elms station, and remained there more than a day, and when at length forwarded to the cattle station at King's Cross had suffered injury from want of food. If the defendants were bound to carry no further than Nine Elms there was no cause of action. The jury found that there was a contract to carry to King's Cross, and gave a verdict for the plaintiff for 4*l.* 15*s.* 6*d.*

Giffard, Q.C., having obtained a rule to enter a nonsuit, on the ground that the consignment note was conclusive evidence of the terms of the contract, and the defendants therefore were not bound to carry the cattle beyond Nine Elms station,

Baylis shewed cause. The consignment note was never intended

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to be the contract between the parties, but merely a notice of the goods that were sent; and the true contract may therefore be shewn by parol evidence: *Rogers* v. *Hadley*. (1) It could not be the complete contract, for it did not contain the price, which is an essential part of the contract: *Elmore* v. *Kingscote*. (2) And even if the note must be taken as proving a contract to carry the cattle to Nine Elms, parol evidence may be given that a further agreement was made at the same time to carry them from thence to King's Cross: *Lindley* v. *Lacey*. (3)

Giffard, Q.C., and *C. W. Wood*, in support of the rule. The document gives the terminus ad quem and the terminus à quo; and the fact that it does not contain all the terms of the agreement does not get rid of the rule of law that a written document is binding as to all the terms contained in it: *Jeffery* v. *Walton* (4); *Hoadly* v. *M'Laine*. (5)

[MONTAGUE SMITH, J. There the price was not agreed upon.]

There is a place in the form for the price, though in this case it was not filled in. The plaintiff says, that the document was not read over to him before he signed it, but he does not say that he did not know it contained the agreement, and no fraud is alleged, so that he is clearly bound by it: *Van Toll* v. *South Eastern Railway Company*. (6)

ERLE, C.J. I am of opinion that this rule should be discharged. The action was for not performing a contract to carry certain cattle to King's Cross; and the question is, whether there was any evidence of a contract to carry to King's Cross. There was very distinct parol evidence given of such a contract; but on the part of the defendant there was a paper put in which was signed by the plaintiff at the time when the cattle were delivered, and in that paper the terminus ad quem was stated to be Nine Elms; and the defendants contended that this was conclusive evidence that the contract was to carry to Nine Elms, and no farther. I think that it is not so, because it seems clear on the evidence that there may have been a contract to carry to Nine Elms, and an

(1) 2 H. & C. 227; 32 L. J. (Ex.) 241.
(2) 5 B. & C. 583.
(3) 34 L. J. (C. P.) 7.
(4) 1 Stark. 267.
(5) 10 Bing. 482.
(6) 12 C. B. (N.S.) 75; 31 L. J. (C. P.) 241.

additional contract to carry the cattle on from thence to King's Cross. The parol evidence, therefore, does not vary or contradict the written document, but only makes an addition to it. Parol evidence must be admitted as to one important term of the contract, viz., the price, which is not mentioned in the written document; and as there is strong evidence of the additional contract to carry on the cattle to King's Cross, it also must be admitted.

WILLES, J. I am of the same opinion, and on the same grounds. If the price had been inserted, it would have been the price of the carriage to Nine Elms; would not parol evidence have been admissible to shew that the plaintiff had paid more than that sum; and that the additional money was for the carriage of the cattle on from Nine Elms to King's Cross? Could it have been said that that was inconsistent with the written document? With respect to the case of *Jeffery* v. *Walton* (1), I wish to say, that notwithstanding the high reputation of the reporter, I think he must have misrepresented the reason why the plaintiff was precluded from giving any evidence as to the time of hiring and rate of payment. The writing in that case did not purport to be an agreement, but was only a memorandum in pencil; and the judge who decided the case of *Wain* v. *Warlters* (2) could hardly have meant to describe it as a binding agreement. The ruling may be sustained, however, on the ground that the memorandum was given by one of the parties to the other at the time as evidence of the agreement between them, and was acted upon by both parties, and there was therefore an estoppel in evidence which would sustain the ruling, without any reference to the other doctrine.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorney for plaintiff: *T. W. Payne.*

Attorney for defendants: *Lewis Crombie.*

(1) 1 Stark. 267. (2) 5 East. 10.

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HIRSCHFELD *v.* SMITH.

Bill of exchange, drawn and indorsed in England, payable in France—Notice of dishonour to English indorser—Material alterations.

A bill for 250*l.* was drawn in England payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and indorsed by the drawer *in blank*, and by him delivered to the defendant in England; the defendant indorsed it *in blank*, and delivered it to the plaintiff in England, and he indorsed and delivered it to a banker in France for presentment. The bill was presented and dishonoured:—

Held, that a notice of dishonour given to the defendant according to the formalities and within the time prescribed by the French law, was a good notice; first, upon the authority of *Rothschild* v. *Currie* (1 Q.B. 43), and secondly, upon the ground that, if the contract of an indorser in England of a bill accepted payable in a foreign country be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such indorser, unless he has given due notice of dishonour according to the law of England, then, notice valid according to the law of the place where the bill is payable may be, and ought (unless the case is exceptional) to be deemed due notice according to the law of England, that is, such notice as can reasonably be required under the circumstances.

The law of France requiring indorsements to be special, and to state a date and a consideration, the plaintiff turned the blank into *special* indorsements, by inserting the requisite words above each name on the back of the bill. He also, by writing on the face of the bill, professed to fix the rate of exchange at which the bill was payable. The special indorsement to the defendant stood thus:—"Pay to the order of Mr. E. T. Smith, at the rate of 25fr. 75c. for 1*l.*, value received, the sum of 6437fr. 50c., ut retro":—

Held, such a material alteration of the rights and liabilities of the parties to the contract as avoided the bill in the hands of the plaintiff.

THIS was an action by the holder against the indorser of a bill of exchange for 250*l.*, drawn by one Lion, in London, on the 20th of April, 1864, addressed to one Pelagot, in Paris, requiring him to pay the amount to the order of Lion three months after date, and accepted by Pelagot and indorsed by Lion to Smith, and by Smith to the plaintiff.

The defendant pleaded that he had not due notice of dishonour of the bill; and that, after he had indorsed the bill, the said indorsement was made void by being materially altered without the defendant's consent, that is to say, by certain words so materially altering the same being written on the back of the said bill above the defendant's said indorsement. Issue thereon.

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The case was tried before Willes, J., at the sittings in London after Michaelmas Term, 1864, when the following facts appeared in evidence:—The bill was drawn by Lion in London and accepted by Pelagot in Paris, and afterwards indorsed in blank in London by Lion, and delivered to Smith, who indorsed it, also in blank, in London, to the plaintiff. On the maturity of the bill it was indorsed by the plaintiff and transmitted by the plaintiff to his brother Eustace Hirschfeld, who happened to be then in Paris, and who indorsed and delivered it to one Berle, a banker in Paris, for collection. The bill was duly presented to the acceptor for payment, and dishonoured. It was thereupon taken to the proper office in Paris, and protested, and a copy of the protest was transmitted to the French Consul in London, by whom notice was, in due course, according to the French practice, given to the defendant.

The law of France requiring the indorsement of a bill of exchange to be special, and to state a date and a consideration, the plaintiff altered the indorsements in blank by turning them into special indorsements. He also added to the indorsement of Lion to Smith the rate of exchange according to which payment was to be made, making that indorsement run thus:—"Pay to the order of Mr. E. T. Smith, at the rate of 25 *fr.* 75 *c.* for 1*l.*, value received, the sum of 6437 *fr.* 50 *c.*, ut retro;" and he wrote the same words on the face of the bill, purporting to make them part of the acceptor's contract.

On the part of the defendant, it was insisted that the bill having been drawn and indorsed in England, he was entitled to notice of dishonour according to the law of England; and that the alterations in the indorsements and upon the face of the bill so altered the contract of the acceptor and of himself as indorser,—which was, to pay according to the rate of exchange at the time of dishonour,—as to render it void.

For the plaintiff it was contended that the bill, being payable in France, was a French bill, and consequently that a notice good according to the French law was a valid notice of dishonour to charge the defendant with an action here: and evidence was offered for the purpose of shewing that the words interpolated before the first indorsement, "pay at the rate of 25 *fr.* 75 *c.*," did

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not entitle the holder to demand payment at that rate of exchange, but was merely a declaration obligatory on the holder not to demand a higher rate than 25*fr.* 75*c.*, even if the current rate should be higher; leaving the right of the acceptor or other party to pay at the lower rate, if the actual rate should be lower, unaffected thereby.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for the amount of the bill and interest, if the Court should be of opinion that the objections were not well founded.

E. James, Q.C., in Hilary Term, 1865, obtained a rule nisi to enter a verdict for the ~~defendant~~, on the ground of misdirection, the notice of dishonour being sufficient to entitle the plaintiff to recover. He referred to *Rothschild* v. *Currie*. (1)

H. James, and *Harington*, shewed cause. The notice of dishonour, though sufficient according to the French law, was bad according to the law of England; but, so far as regards the indorsements made in England, this is to be considered an English bill, and therefore the defendant was entitled to a notice according to the English law. If it be a French bill there has been no sufficient indorsement according to the law of France. It may indeed be that the indorsee in blank is entitled to make the indorsement a formal one, but he clearly could have no right arbitrarily to fix the rate of exchange at 25 fr. 75 c., the acceptor's contract being to pay at the rate of exchange at the maturity of the bill. Whether the bill be an English or a foreign one, every fresh indorsement is a new drawing; and the contract of the indorser is, to pay the amount if the acceptor makes default. That contract must be subject to the law of the place where the contract of indorsement is made,—the indorser's contract being an engagement to pay in London if the acceptor makes default in Paris. The case of *Rothschild* v. *Currie* (1), it must be admitted, is against the defendant's contention; but the propriety of that decision has been doubted; and it is inconsistent with many authorities of earlier date. In *Gibbs* v. *Fremont* (2), it is re-

(1) 1 Q. B. 43. (2) 9 Ex. 25; 22 L. J. (Ex.) 302.

ferred to by Alderson, B., as of questionable authority; and, in giving judgment, that learned judge says: "The general rule in all cases like the present is, that the lex loci contractus is to govern in the construction of the instrument; but that applies only when the contract is not express; if it is special, it must be construed according to the express terms in which it is framed. If the interest be expressly or by necessary implication specified on the face of the bill, then the interest is governed by the terms of the contract itself; but if not, it seems to follow the rate of interest where the contract was made: so if the mode of performing it be expressly or impliedly specified, as was the case of *Rothschild* v. *Currie*. (1) In the case of a bill drawn at A., it primâ facie bears interest as a debt at A. would, if nothing else appeared; but, if that bill be indorsed at B., the indorser is a new drawer, and it may be a question whether this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case, it would carry interest at the rate at B., in the latter, at the rate at A.; and on this subject we find a difference of opinion in the books,—Mr. Justice Story, in his Conflict of Laws, s. 314, maintaining the former, and Pardessus, Droit de Commerce, art. 1500, maintaining the latter opinion."

[BYLES, J. That case has been doubted.]

Rothschild v. *Currie* (1) is thus spoken of in Byles on Bills, 8th ed. 372: "It has been held, *but perhaps erroneously*, that not only the protest but the notice of dishonour must be regulated by the law of the country where the bill is payable. A bill was drawn in England in favour of the defendant, a payee in England, on a house in Paris, and accepted in Paris *payable there*, and indorsed to the plaintiff in England. The bill being dishonoured by non-payment, notice was given to the plaintiff in England, which notice was good according to the French law, but too late according to the English law. The notice was transmitted the same day by the plaintiff to the defendant. An action was brought in England by the plaintiff, the English indorsee, against the defendant, an English indorser. It was insisted by the defendant that the requisites of the notice which was received

(1) 1 Q. B. 43.

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in England should, as between the indorsee and indorser, both domiciled in England, be regulated by the English law. But the court of Queen's Bench held that the bill, being payable in France, was to be considered, even as between the indorsee and indorser, as a French contract, and that the French law as to notice of dishonour must therefore so far prevail." The same view is expressed in Chitty on Bills (ed. 1859), p. 172. The only distinction that exists between that case and the present, is, that there the bill was by the form of the acceptance made payable in Paris. In *Allen* v. *Kemble* (1), it was held that, if a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable according to the lex loci contractus, and not according to the law of the country where the bill was made payable: but that, where a bill is drawn generally, the liabilities of the drawer, acceptor, and indorsers, are governed by the laws of the countries in which the drawing, acceptance, and indorsement respectively take place. In delivering judgment there, Lord Kingsdown adverts to Mr. Justice Story's disapproval of the decision in *Rothschild* v. *Currie*. (2) In Story on Bills, s. 296, note (edit. 1860), referring to *Rothschild* v. *Currie*, it is said: "For this doctrine, reliance was mainly placed upon the text of Pothier, *de Change*, n. 155. The language of Pothier is that the form of the protest, the time of making it, and the notice of it, are to be regulated by the law of the place where the bill of exchange is payable. In respect to the form of the protest, he says there is no doubt; for it is a general rule that, in respect to the formalities of acts, we are to follow the laws and style of the place where the act is done. He then adds that the same thing applies in respect to the time within which the protest ought to be notified; for the bill of exchange is to be deemed contracted in the place where it is payable, according to the rule, contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit (3); and, consequently, the obligations of it ought to be governed by the laws and usages of the same place, to which the parties must be presumed to have submitted themselves, according to another rule: In contractibus veniunt ea quæ sunt

(1) 6 Moore, P. C. 314. (2) 1 Q. B. 43.
(3) D. 42, 5, 3; D. 44, 7, 21.

moris et consuetudinis in regione in qua contrahitur. Now, so far as regards the formalities of the protest, and the time of making it, there is no doubt whatsoever that the rule is universally adopted in the commercial world, that they are to be according to the law of the place where the acceptance and payment of the bill are to be made: Chitty on Bills, p. 490 (8th ed.). But the doctrine of Pothier is supposed to go much further; and if it does, and extends to the case of notice to indorsers who have indorsed the bill in a foreign country (upon which, it seems to me, there may be room for doubt), his reasoning in support of it is founded upon a false foundation; and the maxim cited by him, contraxisse, &c., would lead to the opposite conclusion. The acceptor agrees to pay in the place of acceptance, or the place fixed for the payment: *Cooper* v. *The Earl of Waldegrave* (1); but, upon his default, the drawer and indorsee do not agree, upon due protest and notice, to pay the like amount in the same place; but agree to pay the like amount in the place where the bill was drawn or indorsed by them respectively. Hence it is that the notice to be given to each of them must and ought to be notice according to the law of the place where he draws or indorses the bill, as a part of the obligation thereof. The drawer and indorser in effect contract in the place where the bill is drawn or indorsed, a conditional obligation, that is, if the bill is dishonoured, and due notice is given to them of the dishonour according to the law of the place of their contract, they will respectively pay the amount of the bill at that place. The law of the place of the acceptance or payment of the bill has nothing to do with their contract; for it is not made there, and has no reference to it. The maxim contraxisse, &c., in truth, has no just application to such a case. It properly applies to the case where the same person, by a contract made in one place, promises to pay money in another place. But, if it is to have any application to the case of a drawer or an indorser of a bill, it must be to make the other maxim apply: In contractibus veniunt ea quæ sunt moris et consuetudinis in regione in qua contrahitur. Pardessus lays down the rule in its true sense, and insists upon the distinction between the cases of the contract of

(1) 2 Beav. 282.

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the acceptor and the contract of the drawer and indorser. The contract of the acceptor is a contract made in the place of acceptance, and governed by the law of that place. But the contract of the drawer is a contract made in the place where it is drawn, and of the indorser, a contract in the place where the indorsement is made, and governed by the law thereof. Hence he says, that, if a bill is drawn in France, where a protest is required to prove the dishonour of a bill upon a foreign country where no protest is required, still the drawer will not be bound unless a protest is duly made in the foreign country. Whether this doctrine be strictly correct or not, it shews in a striking manner the opinion of Pardessus upon the whole subject. He adds, what is most material to the present purpose, that the indorser is liable only in the same manner and under the same circumstances as the drawer would be; that is, according to the law of the place of his contract; and that all the obligations and qualifications of it imposed by the local law are binding and operative upon him: Pardessus Droit. Comm. tom. 5, art. 1488, 1497 to 1499, p. 252 to 255, 280 to 287. And he expressly declares that every indorser is to have notice according to the law of the place of his indorsement, since it is a part of the contract: Id. art. 1485, 1499. His reasoning is at variance with that of the learned judge who delivered the opinion of the Court in *Rothschild* v. *Currie*. (1) With the greatest deference for that learned judge, it seems to me that the decision of the Court is not sustained by the reasoning on which it purports to be founded. The Court there admits that the notification of the dishonour is parcel of the contract of the indorser; and, if so, then it must be governed by the law of the place (England) where the indorsement was made, upon the very rules cited by the Court from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the acceptor with the contract of the drawer and the indorser. He proceeds to cite a number of American authorities which are opposed to the doctrine of *Rothschild* v. *Currie*. (1)

[BYLES, J. But they all profess to be founded upon the English common law.]

The law is laid down in similar terms in Story's Conflict of

(1) 1 Q. B. 43.

Laws, s. 36. In France this would be regarded as an English bill. In Demangeat's Traité de la Lettre de Change, p. 32, it is said: "Demandons-nous tout d'abord par quelle législation la lettre de change est régie quant à sa forme. Elle est régie par la législation du lieu où elle est crée, quand même cette législation serait diamétralement contraire à celle du lieu où la lettre est payable. Il en sera de même des contrâts et des engagements qui s'y rattachent, de l'endossement, en particulier. Si donc une lettre de change était endossée à Londres, quand même elle aurait été tirée en France et serait payable en France, c'est à la loi anglaise qu'il faudrait se reporter, pour apprécier la validité de l'endossement et pour en déterminer les effets." If, as will be contended on the other side, this was a French bill, the indorsements should have complied with the French law, which requires that the indorsement should be dated, that it should express the value given for it, and that it should contain the name of the person to whose order it is passed: Code de Commerce, art. 137. If the indorsement does not comply with these requirements, it does not operate a transfer of the bill; it is only a procuration: art. 138. Then the alterations in the indorsements here operated such a material change in the contract as to discharge the indorser. A bill or note is avoided by an alteration in a material part, though made by a stranger: *Davidson* v. *Cooper*. (1) Nougier (Des Lettres de Change, tom. 1, 420) says: "Tout le monde le reconnait, celui qui est détenteur du titre en virtu d'un endossement en blanc a le droit de remplir cet endossement en son nom, et de se donner ainsi la qualité de porteur. Mais, a-t-il le droit aussi de modifier les régles ordinaires de l'endossement et du contrât du change? Par exemple dans l'endossement qu'il escrit au dos du titre, au lieu et place de l'endossement en blanc, peut-il insérer ou un aval ou une dispense de protêt, et se faire ainsi, à lui devenu porteur, une situation meilleure que celle qui ressort de la loi? Je ne le pense pas." The contract of the indorser is a mere contract of indemnity: the undertaking of the defendant, therefore, was to pay 250*l.*, provided the acceptor failed to pay that amount at the maturity of the bill. The holder clearly had no right to alter the contract of the indorser in the way he did: it was a mate-

(1) 11 M. & W. 778; affirmed on error, 13 M. & W. 343.

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rial alteration, and avoided the contract altogether: *Davidson* v. *Cooper*. (1)

E. James, Q.C., and *Tapping*, in support of the rule. The bill having been drawn upon a person residing in Paris, it was to all intents and purposes a foreign bill, and to be governed by the French law as to notice of dishonour, and that law, it is conceded, has been duly complied with. By his indorsement, the defendant undertook to pay the amount of the bill on the acceptor's making default. The contract of the acceptor is, to pay at the place where the acceptance was made; that of the indorser, to pay, on the acceptor's making default, at the place where the indorsement is made: but still the notice of dishonour is to be regulated by the law of the country where the dishonour takes place. *Rothschild* v. *Currie* (2) is precisely in point. In an action by indorsee against the payee and indorser of a bill of exchange drawn in England upon and accepted by a French house, both plaintiff and defendant being domiciled in England, it was held that due notice of the dishonour by the acceptor was part of the contract; that the bill, being made payable by the acceptor abroad, was a foreign bill, and the lex loci contractus must therefore prevail; and that it was sufficient for the plaintiff to shew that he had given the defendant such notice of the dishonour and protest as was required by the law of France. According to the judgment of Lord Mansfield in *Robinson* v. *Bland*, 1 W. Bl. 257, 258, the lex loci contractus here was Paris, where the bill was accepted, and where the acceptor resided. *Rothschild* v. *Currie* (2) must govern the decision here, notwithstanding the animadversions of Dr. Story upon that case. In *Don* v. *Lippmann* (3), Lord Brougham says: "The general law is, that, where the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt." In Byles on Bills, 8th edit., 370, it is said, that "where a contract is made in one country, to be performed in another, the country where the contract is to be performed is deemed the country in which it was made. Such seems to be the general rule of the civil law. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.

(1) 11 M. & W. 778; in error, 13 M. & W. 343.

(2) 1 Q. B. 43.

(3) 5 Cl. & F. 1, 12.

Some learned civilians have, indeed, entertained a different opinion, but such is unquestionably the general rule in the common law of England." In Story on Bills, s. 129, it is said: "It may be laid down as a general rule, that every contract is, as to its validity, nature, interpretation, and effect, governed by the law or state of the country where it is to be made and is to be executed. If it is made in one place, to be executed in another country or territory, then it is governed by the law of the country or territory where it is to be executed; for the parties are presumed to look to that for its interpretation, validity, and effect. Both rules are fairly deducible from the civil law, where it is said in one passage, 'Si fundus venierit ex consuetudine ejus regionis in qua negotium gestum est, pro evictione caveri oportet' (1); and in another passage, 'Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit' (2); and again, in another passage, 'Contractum autem non utique eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia.' (3) Paul Voet has accordingly expounded this as the general doctrine: 'Quid si de litteris cambii incidat quæstio, Quis locus erit spectandus? Is spectandus est locus ad quem sunt destinatæ, et ibidem acceptatæ.'" (4)

[ERLE, C. J. As regards the protest and notice of dishonour, the place where the bill is payable governs.] 3 C&P 540

So says Story, s. 131.

[BYLES, J. Pardessus (5) says that the law of the place where the indorsement is made is to govern.]

Pardessus can hardly be looked upon as an authority on the subject at the present day. The uniform notion of all commercial countries in Europe now is, that the form and effect of the protest are governed by the law of the place where the bill is payable: Nougier, Des Lettres de Change, vol. ii. ch. 11, s. 3, p. 94; ch. 14, s. 3, pp. 161, 163.

Then, as to the alteration. Witnesses were called on the part of the plaintiff to shew that the additions made to the indorsements did not vitiate the bill. As to the turning the general

(1) Dig. Lib. 21, tit. 2, l. 6.
(2) Dig. Lib. 44, tit. 7, l. 21.
(3) Dig. Lib. 42, tit. 5, l. 3.
(4) P. Voet, de Stat. s. 9, cap. 2, s. 14.
(5) Vol. 5, art. 1485—1499.

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into special indorsements, that presents no difficulty: *Clark* v. *Piggott*. (1) The French Code de Commerce is silent upon the subject; but the advocates stated that it is every day's practice, where a bill is drawn for a sum in English coin payable in France, to write upon the back of the bill the amount in French money; and that this did not give the holder a right absolutely to demand payment at that rate of exchange, but amounted to an obligation on him not to demand a higher rate, whatever the current rate of exchange at the maturity of the bill.

[ERLE, C. J. The addition of immaterial words do not vitiate the instrument. The words here introduced, according to your contention, are material only in favour of the acceptor. If they increased his obligation, doubtless you would admit that their introduction would vitiate the bill.]

It must be conceded that they would.

Cur. adv. vult.

The judgment of the Court (Erle, C.J., Byles, Keating, and Montague Smith, JJ.) was (Jan. 12) delivered by

ERLE, C.J. In this action by the holder against the indorser of a bill of exchange, the defendant relied on two grounds of defence; first, that he had not received due notice of dishonour; secondly, that the bill was rendered void by alteration.

As to the first ground, the facts were that the bill was drawn in England payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawee in blank, and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the plaintiff and delivered to one Berle in France. The bill was duly presented in France, and dishonoured; and the holder took the steps required by the law of France to entitle him to recover from the other parties to the bill, that is to say, the bill was taken to the proper office and a due protest was made, and a copy of the protest was transmitted to the consul for France in the foreign country where the party to the bill was residing, that is to say, as respects the defendant, to the French consul in London; and by that consul the protest was in

(1) 1 Salk. 126; 12 Mod. 193.

due course, according to the French practice, made known to the defendant without delay.

If the action on the bill had been brought in France, upon an indorsement made in France, these facts would have amounted to such notice of dishonour as the law of France requires, and would have entitled the plaintiff to recover. As, however, this action was brought in England, against an indorser indorsing in England, the present question is, whether these facts are evidence of due notice of dishonour, against the defendant, in an action brought in England?

Our answer is in the affirmative, on two grounds—first, because the point has been decided in *Rothschild* v. *Currie* (1), where the bill was drawn, accepted, indorsed, and dishonoured, under circumstances similar to those relating to the present bill, and the facts adduced to shew notice of dishonour were also similar, and were decided to be sufficient because they were sufficient according to the law of France; secondly, if the reason assigned in that case be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser unless he has given due notice of dishonour according to the law of England, then the question is, what notice, under such circumstances, amounts to due notice? If the parties lived in England, and their address was known, the rule is that notice should be sent by the post of the day following the day of dishonour. But, in respect of bills dishonoured in a foreign country, such a rule cannot always have a literal application, because, among other reasons, the postal regulations may make it impossible.

Due notice is such notice as can be reasonably required under the circumstances; and the reasonableness of the notice proved in evidence is a question of law, depending on the facts of each particular case; and such facts are for the jury. In the course of practice, rules have been recognised by the judges, and so have become law: see the judgments of Grove, J., Lawrence, J., and Le Blanc, J., in *Darbishire* v. *Parker*. (2) If by the law of the place where the bill is payable there are regulations for giving notice of

(1) 1 Q. B. 43. (2) 6 East. 2.

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dishonour, in order to make indorsers liable to the holder, a presumption is raised that notice according to those regulations is all that the indorser should require.

The indorser of a bill accepted payable in France, promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to the dishonour of bills; and notice of dishonour is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonour has been sent to him, yet the notice of dishonour according to the law of France may be, and we think ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law.

It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonour, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice valid according to the law of the place should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception.

The defendant's second ground of defence was, the alteration of the bill after the indorsement by the defendant. The facts were that the bill had been indorsed in blank by Lion, the payee, and delivered to the defendant, and by him indorsed in blank in England and delivered to the plaintiff, who took or sent the bill to France, where it was indorsed to one Berle.

The law of France requires an indorsement to be special, and to state a date and consideration; and one alteration made by the plaintiff was turning the indorsements in blank into special in-

dorsements, with a statement of a date and a consideration, viz. for value received. If this had been all, it might be held to make no change in the liability of the parties, but to be a completion of the intention of the parties to indorse, and probably would not have been thought to make the bill void; for a man may convert a blank indorsement into a special indorsement in his own favour: *Clark* v. *Piggott*. (1) But, beyond this, on the special indorsement of Lion to Smith was inserted the rate of exchange according to which payment was to be made, thus:—"Pay to the order of Mr. E. T. Smith, at the rate of 25*fr.* 75*c.* for 1*l.* value received, the sum of 6437*fr.* 50*c.*, ut retro;" and beyond this there was placed on the face of the bill a superscription of the same words, purporting to make them part of the acceptor's contract.

The defendant contended that these alterations altered the contract of the acceptor and of himself, which was, in substance, to pay according to the rate of exchange at the time of dishonour, a rate which might be lower than 25*fr.* 75*c.*; and, as it is law that an alteration of a written contract in a material part makes it void, this contract was rendered void thereby.

The plaintiff attempted to answer this defence by offering evidence to prove that the effect of the words in the indorsement, "pay at 25*fr.* 75*c.*," did not create a right to demand payment at that rate of exchange, but was a declaration obligatory on the holder, whoever he might be, not to demand a higher rate than 25*fr.* 75*c.*, even if the actual rate should be higher; leaving the right of the acceptor or other party to pay at a lower rate, if the actual rate should be lower, unaffected thereby. On this part of the case it is not necessary to say more than that this evidence appears to us to have failed. We have, therefore, to decide whether these alterations render the bill void in the hands of the plaintiff, by whom or on whose behalf they were made: and our answer is in the affirmative. They appear to us to bring this case within the numerous authorities deciding that alterations of an instrument containing a contract, having the effect of varying the rights and liabilities of the parties to that contract, render that instrument void. The contract of the acceptor is altered by the superscription on the face of the bill; and the contract of the indorser is altered

(1) 1 Salk. 126; 12 Mod. 193.

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by the superscription over the indorsements at the back of the bill, with a reference to the superscription added on the face of the bill, by the words "ut retro."

Judgment for the defendant.

Attorney for plaintiff: *L. Hand.*

Attorneys for defendant: *E. S. & H. Brandon.*

[IN THE EXCHEQUER CHAMBER.]

THE CITY OF DUBLIN STEAM-PACKET COMPANY *v.* THOMPSON. 1866 *Feb.* 5.

Ship and Shipping—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104) *—Measurement of tonnage of steam-vessels—Allowance for space occupied by the propelling power.*

The 29th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which impowers the Commissioners of Customs, with the approval of the Board of Trade, to make "such modifications and alterations as from time to time become necessary in the tonnage-rules thereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted," does not authorize them to make rules for the measurement of the tonnage of steam-vessels, which will have the effect of altering the allowance in respect of the space occupied by the propelling power, as provided by s. 23.

So held by the Exchequer Chamber, affirming the judgment of the Common Pleas.

ERROR upon a decision of the Court of Common Pleas on a special case, as follows:—

1. The plaintiffs are a company trading between England and Ireland, and are possessed of many steam-vessels of large tonnage, which are used by them in their trade of carrying passengers and goods to and from England and Ireland.

2. The defendant is one of the surveyors of Customs at the port of Liverpool, and represents the Commissioners of Customs, with whom the present question has arisen.

3. The question in dispute arises upon the construction of certain provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which regulate the mode of ascertaining the registered tonnage of steam-ships, and as to the power of the Commissioners of Customs to refuse the allowance for propelling power, which, as the plaintiffs insist, is provided for by the act of parliament, as hereinafter mentioned.

4. By the 23rd section of the Merchant Shipping Act, 1854, it is enacted, that, "in every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as

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aforesaid [by s. 21], and the remainder shall be deemed to be the registered tonnage of such ship; and such deduction shall be estimated as follows, that is to say,—

(a.) As regards ships propelled by paddle-wheels, in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be 37-100ths of such gross tonnage; and in ships propelled by screws, in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deduction shall be 32-100ths of such gross tonnage.

(b.) As regards all other ships, the deduction shall, if the Commissioners of Customs and the owner both agree thereto, be estimated in the same manner; but either they or he may in their discretion require the space to be measured and the deduction estimated accordingly; and, whenever such measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by or required to be inclosed for the proper working of the boilers and machinery, *with the addition, in the case of ships propelled by paddle-wheels, of one half, and, in the case of ships propelled by screws, of three fourths of the tonnage of such space;* and the measurement and use of such space shall be governed by the following rules, that is to say,—

(1.) Measure the mean depth of the space from its crown to the ceiling of the timber strake; measure also three, or, if necessary, more than three breadths of the space, at the middle of its depth, taking one of such measurements at each end and another at the middle of the length; take the mean of such breadth; measure also the mean length of the space between the foremost and aftermost bulkheads or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; multiply together these three dimensions of length, breadth, and depth, and the product will be the cubical contents of the space below the crown: then find the cubical contents of the space or spaces, if any, above the crown aforesaid, which are framed in for the machinery or for the admission of light and air, by multiplying together the length, breadth, and depth thereof; add such contents to the cubical contents of the

space below the crown, divide the sum by 100, and the result shall be deemed to be the tonnage of the said space.

(2.) If any ship in which the space aforesaid is to be measured the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space.

(3.) In the case of screw-steamers in which the space aforesaid is to be increased, the contents of the shaft-trunk shall be added to and deemed to form part of such space, and shall be ascertained by multiplying together the mean length, breadth, and depth of the trunk, and dividing the product by one half.

(4.) If in any ship in which the space aforesaid is to be measured, any alteration be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered, until re-measurement.

(5.) If in any ship in which the space aforesaid is to be measured, any goods or stores are stowed or carried in such space, the master and owner shall each be liable to a penalty not exceeding 100*l.*

5. By the 29th section of the same act it is further enacted that, "the Commissioners of Customs may, with the sanction of the Treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit, and may with the approval of the Board of Trade make such regulations for that purpose as may be necessary; and also, with the like approval, make such modifications and alterations as from time to time become necessary in the tonnage-rules hereby prescribed, in order to the more accurate and uniform application thereof, and effectual carrying out of the principle of admeasurement therein adopted.

6. There are several other sections of the act which have some bearing on this question, and to which it may be useful to refer, viz. ss. 20, 21, 84, 86, and 87.

7. On the 23rd of October, 1860, the Commissioners of Customs, with the approval of the Board of Trade, issued the following order:—

"In pursuance of the powers granted by the 29th section of the Merchant Shipping Act, 1854, the board, with the approval of the

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Board of Trade, direct, with a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling power, that, in lieu of the rule set forth in s. 23 of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 18, and 20 of Instructions to Measuring Surveyors, of 1855, the following rule be adopted in future, viz.:—

"Rule. In every ship propelled by steam or other power requiring engine-room, an allowance of space or tonnage shall be made for the space occupied by the propelling power; and the amount so allowed shall be deducted from the gross tonnage of the ship; and such deduction shall be estimated as follows:—

"(1.) Measure the mean length of the engine-room between the foremost and aftermost bulk-heads in limits of its length, excluding such parts (if any) as are not actually occupied by or required for the proper working of the machinery: then measure the depth of the ship at the middle point of this length, from the ceiling at the limber strake to the upper deck in ships of three decks and under, and to the third deck or deck above the tonnage-deck in all other ships; also the inside breadth of the ship, clear of sponsing (if any), at the middle of the depth: multiply together these dimensions of length, depth, and breadth, for the cubical contents: divide this product by 100, and the quotient shall be deemed to be the tonnage of the engine-room, or allowance to be deducted from the gross tonnage on account of the propelling power.

"(2.) In the case of ships having more than three decks, the tonnage of the space or spaces betwixt decks (if any), above the third deck, which are framed in for the machinery, or for the admission of light and air, found by multiplying together the length, breadth, and depth thereof, and dividing the product by 100, shall be added to the tonnage of such space.

"(3.) In the case of screw-steamers, the tonnage of the shaft-trunk shall be deemed to form part of and added to such space, and shall be ascertained by multiplying together the length, breadth, and depth of the trunk, and dividing the product by 100.

"(4.) In any ship in which the machinery may be fitted in separate compartments, the tonnage of each such compartment shall be measured severally in like manner according to the above

rules; and the sum of their results shall be deemed to be the tonnage of the said space.

"Ordered. That the proper officers in London, and the collectors and comptrollers at the outports, do govern themselves accordingly in all future operations for estimating the allowance to steamers for their propelling powers, and, with regard to the engine-rooms or allowance to steamers already measured, that they be re-measured agreeably to the above modification of the rule, on the application of their owners or agents, and on delivery of the original certificates for indorsement."

8. At the time of the passing of the Merchant Shipping Act, 1854, the plaintiffs were, and still are, possessed of (amongst other ships) the paddle-wheel steam-ship *St. Columba*. The tonnage space solely occupied by and necessary for the proper working of the boilers and machinery was and is above 30 per cent. of her gross tonnage.

After the passing of the said act, the plaintiffs applied, in accordance with the provisions thereof, to have the said ship measured; and the vessel was accordingly measured by the proper officer, and a deduction for the space occupied by the propelling power was allowed according to clause (b) of the 23rd section of the act, including the addition of one half the tonnage of the space of the propelling power. The register tonnage for dues was then ascertained and fixed at 206 tons; and her tonnage was accordingly so entered in the register of shipping in the port of Dublin.

10. In 1862, the plaintiffs lengthened the said ship *St. Columba*, by adding to her length forty feet; and, as this increased her tonnage, it became necessary, in accordance with the provisions of the Merchant Shipping Act, 1854, to have her re-measured; and she was accordingly re-measured by the proper officer for that purpose in the port of Liverpool, where the alterations in her were being made, and without any application for the purpose being made by the plaintiffs. Her tonnage space solely occupied by the propelling power was then above 30 per cent. of her tonnage, as before mentioned.

11. On this re-measurement the gross tonnage of the ship was increased by 122 tons. The officers who conducted the measure-

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ment measured her according to the directions contained in the new Customs Rules of October 23rd, 1860. *They allowed only the exact space occupied by or required to be inclosed for the proper working of the boilers and machinery, and declined to allow the one half of the tonnage of the said space, as directed by the 23rd section of the said act.* By this mode of measurement, the tonnage for dues was increased to 456 tons. The plaintiffs objected to this mode of measuring and making the allowance for the propelling power, and required to have the allowance made according to their views of the provisions of the act of parliament, and insisted that the Commissioners of Customs had no power to refuse such allowance.

The question for the opinion of the Court was, whether the additional allowance of one half the tonnage of the space occupied by the propelling power ought, or ought not, to have been made by the officers of registry at Liverpool.

The Court of Common Pleas held that the authority given to the Commissioners of Customs, with the approval of the Board of Trade to modify or alter the tonnage rules prescribed by the 23rd section of the Merchant Shipping Act, 17 & 18 Vict. c. 104, did not warrant them in making rules for the measurement of the tonnage of steam-vessels, which would have the effect of altering the allowance in respect of the space occupied by the propelling power, as provided by that section. (1)

The defendant brought error in the Exchequer Chamber, and the case was argued before Pollock, C.B., Martin and Channell, BB., Blackburn and Mellor, JJ., Pigott, B., and Lush, J.

The Solicitor General (H. Giffard, Q.C., and *C. Pollock* with him), for the defendant, submitted that the 21st, 22nd, and 23rd sections of the Merchant Shipping Act, 1854, are all "tonnage rules," to which the power of alteration given to the Commissioners of Customs, subject to the approval of the Board of Trade, was intended to apply; and that the Court below took too narrow a view of the statute, when they held that the power of the commissioners to alter or modify was limited to the mode of measurement prescribed by the sub-rules 1, 2, 3, 4, 5, at the end of s. 23.

(1) 19 C. B. (N.S.) 553; 34 L. J. (C.P.) 316.

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Bovill, Q.C. (*Watkin Williams* with him), for the plaintiffs, was not called upon.

POLLOCK, C.B. We are all agreed that the judgment of the Court below should be affirmed. The question substantially is, whether the Commissioners of Customs, with the approval of the Board of Trade, may make the regulations which they have made. The 29th section of the Merchant Shipping Act, 1854, impowers them, with the sanction of the Board of Trade, to make "such modifications and alterations as from time to time become necessary in the *tonnage rules* thereby prescribed, in order to the more accurate and uniform application thereof and the effectual carrying out of the principle of admeasurement therein adopted." Speaking for myself, I would observe, that, when an act of parliament confers a power upon a separate body to make alterations in that which the legislature has prescribed, we should look at the act with a certain degree of care, almost with strictness, in order to ascertain the true sense of the language used; and that we must take care not so to construe it as to enable that body to make alterations which were never intended to be within their province. The 23rd section of the statute obviously consists of three parts. The first part enacts, that, "in every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship (ascertained in the manner directed in former sections), and the remainder shall be deemed to be the register tonnage of such ship." The other two parts of the section are distinguished by the letters (a) and (b), which prescribe the allowance to be made and the mode of estimating it; and at the conclusion of those parts which direct the allowance, the clause goes on, "and the measurement and use of such space shall be governed by the following rules;" then come the rules numbered 1, 2, 3, 4, and 5; and I believe there is nothing else in the act which can be called a tonnage rule. Then the 29th section enacts that the Commissioners of Customs may, with the approval of the Board of Trade, "make such modifications and alterations as may from time to time become necessary in the tonnage rules hereby prescribed, in order to the more

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accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted." I think the parts of s. 23 which are marked (a) and (b) are not within the rule, and that the Commissioners of Customs had no power to deal with that part of the act. For these reasons I think the judgment of the Court below should be affirmed.

MARTIN, B., I am of the same opinion; and I think the case a very clear one. I very much doubt whether the Commissioners of Customs meant by the rules which they have made to make any alteration, which would have the effect of excluding the allowances in question. But, whether they meant so or not, I am clearly of opinion that what the legislature intended to give them authority to deal with, was the rules for the measurement of the space numbered 1 to 5 in s. 23, and not with the mode of estimating the allowance or deduction for the space occupied by the propelling power provided in (a) and (b), in which it is distinctly enacted that certain allowances shall be made. I have very little doubt, that for large vessels, such as the *Venetia*, the new mode of measurement introduced by the commissioners may be beneficial, but for a small vessel like the *St. Columba*, it would probably tell very much against the owners' interest. In my judgment, the Commissioners of Customs had no power to deal with the matters prescribed in clauses (a) and (b) of s. 23.

CHANNELL, B., concurred.

BLACKBURN, J. I am of the same opinion. The words at the end of s. 29, which enable the Commissioners of Customs, with the approval of the Board of Trade, to make "such modifications and alterations as from time to time become necessary in the tonnage rules thereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted," sufficiently to my mind indicate what the legislature meant. The 23rd section enacts, that in every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship. It then proceeds in the clauses marked (a) and (b) in substance to provide how the deduction is to be estimated, with the addition of one half of such

tonnage in the case of ships propelled by paddle-wheels, and of three fourths in the case of vessels propelled by screws. I think the commissioners had power to alter the rule as to measuring the space actually occupied by the propelling power, but not to take off the per-centage.

MELLOR, J., PIGOTT, B., and LUSH, J., concurred.

Judgment affirmed.

Attorney for plaintiffs: *T. Browning.*
Attorney for defendant: *F. J. Hamel.*

[IN THE EXCHEQUER CHAMBER.]

TAMVACO *v.* SIMPSON.

Feb. 5.

Ship and shipping—Charter-party, construction of—Prepayment on account of freight—Terminable interest—Lien.

Coals were shipped at Sunderland on the plaintiff's account under a charter-party between one De M. and the defendant (the owner of the vessel), whereby and by the bill of lading they were deliverable at Alexandria "to order or assigns," on payment of freight as per charter-party. The charter-party also contained the following stipulations:—"The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange; one half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading: owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same." On the 31st of October, 1863, De M. handed his acceptance at three months' date for one half of the freight to the agents for the ship, who thereupon indorsed upon the bill of lading "Received on account of the within freight 301*l.* 17*s.* 6*d.*, as per charter-party." De M. indorsed the bill of lading in blank, and forwarded it to the plaintiff at Alexandria, who, on the ship's arrival there, *on the 5th of January*, 1864, demanded the coals on payment of the balance of the charter freight. The master, however, having received information that De M. (whose acceptance was then outstanding) had become bankrupt, refused to deliver the cargo unless the full freight was paid or a guarantee given for its payment. B. & Co., the plaintiff's agents, thereupon gave the required guarantee, and the coals were delivered, and the full freight ultimately paid under protest:—

Held—affirming the judgment of the Court of Common Pleas—that the defendant had no lien upon the cargo for the half-freight represented by De M.'s acceptance, and that the plaintiff was entitled to recover it back, either as damages in an action for a wrongful conversion, or as money received to his use.

THIS was an action brought to recover 301*l.* 17*s.* 6*d.*, under the circumstances stated in the following case:—

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1. The plaintiff is a merchant residing at Alexandria, in Egypt, and the defendant is a shipowner at Sunderland, and owner of a ship called the *Parthian*.

2. On the 1st of September, 1863, Messrs. Zizinia & Co., of London, as agents for the plaintiff, entered into a contract with W. N. De Mattos, also of London, for the purchase of 2000 tons of steam coal. The contract contained the following stipulations: —"The bills of lading for the entire quantity to be delivered to the purchasers by the end of the present month (September), in two or more shipments. Messrs. Zizinia & Co., agree to pay on receipt of the documents (bill of lading and policy of insurance), at the rate of 34*s.* per ton of 20 cwt. net cash, deducting the balance of freight payable to the captains at Alexandria, together with a commission of 3 per cent. upon the full 34*s.* per ton; said balance of freights to be paid in cash at Alexandria, at the current rate of exchange for three months' bills on London. The coals to be taken from alongside the ship at the buyers' risk and expense, at the rate of not less than 30 tons per weather working day, Sundays excepting."

3. In pursuance of this contract, De Mattos chartered certain vessels for the conveyance of the said coals, and, amongst others, he chartered the defendant's vessel the *Parthian*, by a charter-party dated the 1st of October, 1863, by which the owner agreed that the ship should with all possible despatch sail and proceed to South Dock, Sunderland, and there load in the customary manner from the factors of the freighter a full and complete cargo of steam coals, and should therewith proceed to Alexandria, and there deliver the same, on being paid freight at and after the rate of 30*l.* per keel of 21 tons 4 cwt., taken on board and delivered in full of all port charges and pilotages, harbour dues on cargo, &c.; and which also contained the following stipulation as to freight:—"The freight to be paid on unloading and right delivery of the cargo, less advances in cash at current rate of exchange: one half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading: owner to insure the amount, and deposit with charterer the club policy, and to guarantee same."

4. In accordance with the charter-party, De Mattos shipped on board the *Parthian* 426 tons 13 cwt. of steam coals, being part of

the 2000 tons he had contracted to sell to Messrs. Zizinia & Co., for the plaintiff as before stated. The captain of the *Parthian* thereupon signed a bill of lading for the said 426 tons 13 cwt. of coals, engaging to deliver them alongside any craft, steamer, floating depôt, wharf, or pier where the ship could be afloat at the port of Alexandria, as the agent of the charterer might direct; "freight for the said goods to be paid as per charter-party."

5. The freight on the coals so shipped on board the *Parthian* amounted, at the rate of 30*l.* per keel, reserved by the charter-party, to 603*l.* 15*s.*, one half of which sum was 301*l.* 17*s.* 6*d.*

6. Upon the bill of lading being signed as aforesaid, De Mattos gave his acceptance at three months for 301*l.* 17*s.* 6*d.*, in favour of the defendant, pursuant to the terms of the charter-party.

7. The acceptance was dated the 31st of October, 1863, and became due on the 3rd of February, 1864. Upon its being so given the defendant's agents, Smith, Sundius & Co., indorsed a receipt on the said bill of lading, as follows:—

"Received, on account of the within freight, three hundred and one pounds, seventeen shillings, and sixpence, as per charter-party.

For Mrs. Mary Simpson,

301*l.* 17*s.* 6*d.* Smith, Sundius, & Co., as agents."

8. De Mattos then made out and delivered to the plaintiff's agent an invoice shewing what was due for the coals shipped by the *Parthian*, as follows:—

"London, 28th October, 1863.

	£	s.	d.	£	s.	d.
Messrs. Zizinia & Co., to W. N. de Mattos, under contract of September 1st, 1863, 426 13/20 tons of Davison's West Hartley large steam coals shipped at Sunderland, per *Parthian*, Simpson master, for delivery at Alexandria, at 34*s.* per ton				725	6	1
Freight at 30*l.* per keel	603	15	0			
Gratuity	5	5	0			
	609	0	0			
Less advance on sailing	301	17	6	307	2	6
				418	3	7
Less 3 per cent. on 725*l.* 6*s.* 1*d.* ..				21	15	2
Received by cheque. (Signed.)				£396	8	5

9. On the 28th of October, 1863, De Mattos indorsed the bill

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of lading in blank, and handed it so indorsed to Messrs. Zizinia & Company, the plaintiff's agents, who, on the 31st of October, 1863, paid De Mattos the balance of 396*l.* 8*s.* 5*d.*, appearing due on the aforesaid invoice.

10. Messrs. Zizinia & Company afterwards forwarded the bill of lading, so indorsed by De Mattos, to the plaintiff at Alexandria.

11. The defendant was not informed, nor had she any knowledge any time before the commencement of the action, of the said contract between the plaintiff's agents and De Mattos of the 1st of September, 1863, or of the invoice, or of the payment of the balance appearing due thereon, or of any dealings or transactions between the plaintiff or his agents and De Mattos relating to the premises.

12. The ship sailed with the said cargo from Sunderland for Alexandria on the 4th of November, 1863; and shortly after she so sailed De Mattos became and declared himself insolvent, and ultimately, on the 4th of January, 1864, a deed of inspectorship was executed by him and divers of his creditors, not including either the plaintiff or the defendant, under and in accordance with the 192nd section of the Bankruptcy Act, 1861, but without the written assent or approval of the plaintiff or the defendant. This deed was registered in accordance with the provisions of the 192nd section on the 1st of February, 1864; and, for the purpose of this case, it was to be assumed that all the conditions required by the section to make the deed valid and effectual and binding on all the creditors of the charterer, as if they were parties to and had executed the same, were duly performed at the time of the said registration. The provisions of the deed are set out in *Strick* v. *De Mattos* (1), and were to be taken as part of this case.

13. The *Parthian* afterwards sailed for Alexandria, and arrived there with the cargo on the 5th of January, 1864, on which day the captain reported her arrival to the plaintiff, and stated that he would on the following day be ready to discharge the cargo.

14. The plaintiff, then being the holder of the said bill of lading as such indorsee as aforesaid, thereupon took the necessary measures for receiving the cargo, and intimated to the captain that he was prepared to pay the balance of the freight remaining

(1) 3 H. & C. 22.

unpaid after deducting the 301*l.* 17*s.* 6*d.* referred to in the receipt on the bill of lading. On the following day, viz., the 6th of January, 1864, the captain of the *Parthian*, who by letters received by him on his arrival at Alexandria had learnt that De Mattos had suspended payment, refused to deliver the cargo to the plaintiff except upon the terms of being paid the full amount of the freight without making any such deduction, or having a guarantee for the payment of the same.

15. The master of the *Parthian* thereupon claimed to have a lien upon the said cargo for the payment of the full chartered freight, and, in exercise of such alleged lien, detained the said cargo on board the ship until the 20th of January; the plaintiff during all that time refusing to make such payment, or to guarantee or procure a guarantee for the payment to the master of the full charter freight.

16. De Mattos' acceptance was not due until the 3rd of February, 1864, and was therefore not due at the time when the captain refused to deliver the coals to the plaintiff.

17. The acceptance at this time was in the hands of third parties, and was not paid at maturity, but was taken up by the defendant before the commencement of this action.

18. On the 20th January, 1864, Messrs. Barker & Co., of Alexandria, at the request of the plaintiff, and to procure delivery of the cargo to the plaintiff, gave the master of the *Parthian*, the following guarantee, the master still continuing his refusal to deliver the cargo without being paid the full amount of the freight or having a guarantee for the payment thereof as aforesaid:

"Alexandria, 20th January, 1864.

Captain Simpson, of the *Parthian*.

Sir,—In consideration of your agreeing, at our request, to deliver to Mr. E. Tamvaco the cargo of coals at present on board your vessel, we hereby undertake and guarantee, that, when and so soon as you shall have delivered the said cargo unto the said Mr. E. Tamvaco or his order, we will on demand pay or cause to be paid to you in cash the full amount of freight due and payable to you in respect of the said cargo, without any deduction whatsoever, except commission due.—Barker & Co."

19. The master of the *Parthian*, upon receiving this guarantee,

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forthwith commenced to deliver the cargo to the plaintiff, and completed such delivery on the 13th of February, 1864.

20. Upon the completion of the said delivery, the master of the *Parthian* (De Mattos' acceptance having been in the meantime dishonoured at maturity) applied to the plaintiff for payment of the full chartered freight, and, upon the plaintiff's refusal to pay the same, he applied to Messrs. Barker & Co. for payment thereof in pursuance of their guarantee. Messrs. Barker & Co., however, by the plaintiff's instructions, and on his behalf, also refused to pay the same; whereupon the master of the *Parthian* instituted legal proceedings against Messrs. Barker & Co., in the Consular Court at Alexandria (which had jurisdiction in the matter), for the recovery of the sum due from Messrs. Barker & Co. to him on their guarantee, and the cause was proceeded with and duly prosecuted, and a day fixed for the trial of the same, but, on the day before such last-mentioned day, Messrs. Barker & Co., on behalf of the plaintiff, and by his authority, and in discharge of their liability under the guarantee, viz., on the 7th March, 1864, paid the master of the *Parthian* the amount agreed to be paid by them under the guarantee, without making any deduction for the 301*l.* 17*s.* 6*d.*, the plaintiff at the same time protesting against such payment being demanded or made; and a copy of such protest was served on the master of the *Parthian*.

21. Upon receiving the amount so paid by Messrs. Barker & Co., the master of the *Parthian* gave them a receipt.

22. The plaintiff afterwards, and before the commencement of this action, repaid Messrs. Barker & Co. the amount so paid by them to the master of the *Parthian* as aforesaid.

23. The average length of a voyage of a vessel of the same class as the *Parthian*, from Sunderland to Alexandria, is two months.

The questions for the opinion of the Court were: First, whether, under the circumstances before set out, the plaintiff was, at the time when the captain of the *Parthian* refused to deliver her cargo, entitled to have the said cargo delivered to him on payment of the balance of the freight after deducting the 301*l.* 17*s.* 6*d.* Secondly, whether, assuming the plaintiff to be entitled to recover in respect of the said refusal to deliver, he was entitled to recover anything as damages but the damages sustained by him

by being deprived of the possession of the cargo, from the time of the said refusal to the time of the cargo being delivered to him.

If the Court should be of opinion upon both points in the affirmative, then the plaintiff was to have judgment for 301*l.* 17*s.* 6*d.*, with costs. If the Court should be of opinion upon the first point in the affirmative, and upon the second point in the negative, then the plaintiff was to have judgment for 10*l.*, with costs. If the Court should be of opinion upon the first point in the negative, the defendant was to be at liberty to sign judgment as in case of a nonsuit, with costs.

The Court of Common Pleas held that the defendant had no lien upon the cargo for the amount represented by De Mattos' acceptance, and that the plaintiff was entitled to recover the 301*l.* 17*s.* 6*d.* in this action, and that his right was not affected by the proceedings which took place in the Consular Court at Alexandria. (1)

The defendant brought error in the Exchequer Chamber, and the case was argued before Pollock, C.B., Martin and Channell, BB., Blackburn and Mellor, JJ., Pigott, B., and Lush, J.

Lewers (*Manisty, Q.C.*, with him), for the defendant. The first question is, whether, upon the arrival of the ship at Alexandria, the captain had a right to claim a lien for the full charter freight. This depends upon the construction of two clauses in the charter-party which cannot be reconciled consistently with the view taken by the Court below. The first is, "The freight to be paid on unloading and right delivery of the cargo, less advances in cash, at current rate of exchange:" the other, "One half of the freight to be advanced by freighter's acceptance at three months, on signing bill of lading: owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same." It will be contended on the part of the plaintiff that the acceptance was given by way of prepayment pro tanto of the freight. It is submitted, however, that it was not intended to enure as a payment, but was a mere personal loan from the charterer to the shipowner. The latter was to insure it. If it was a payment of freight, she would have had no insurable interest.

(1) 19 C. B. (N.S.) 453; 34 L. J. (C.P.) 268.

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[BLACKBURN, J. It would be equally an insurable interest whether in the shipowner or in the charterer: the only difficulty would be in whom to lay it. If De Mattos had remained solvent, the bill being outstanding, it never could have been intended that the owner should have cash as well as the bill.]

Assuming it to be an advance of freight, the question will be whether such an advance can affect the shipowner's lien. There is nothing on the face of the charter-party to shew that the lien had been waived, as in *How* v. *Kirchner* (1) and *Kirchner* v. *Venus*. (2) The owner's lien is not waived by a mere advance of freight.

[BLACKBURN, J. Why not? Having received a negotiable instrument in part payment of the freight, the owner could not, while the bill was outstanding, claim to be paid in cash.]

The lien was only suspended during the currency of the bill. The day before the consignee was entitled to receive the cargo, De Mattos had executed a deed of inspectorship. The owner's lien immediately thereupon revived; and she was placed in the same position as if the bill had then been dishonoured: *In re The London, Birmingham and South Staffordshire Bank*. (3) The plaintiff can stand in no better position than the charterer himself stood in.

[POLLOCK, C.B. The property in the coals had been transferred to him by the indorsement of a bill of lading, on the back of which was a receipt signed by the agent of the shipowner, acknowledging that the 301*l.* 17*s.* 6*d.* had been paid. Nothing is there said about a bill of exchange.]

The words "as per charter-party" would give the assignee of the bill of lading notice of the manner in which the payment had been made. The indorsee of a bill of lading takes the property subject to all the liabilities by which it is affected: 18 & 19 Vict. c. 111, s. 2. At all events, the damages should be limited to a compensation for the loss actually sustained by the detention of the coals from the 6th to the 20th of January. The plaintiff, by procuring Barker & Co.'s guarantee for the payment of the full freight, put himself in the same position as if he had paid the full freight, the

(1) 11 Moore's P. C. 21. (2) 12 Moore's P. C. 361.
(3) 34 L. J. (Chan.) 418.

guarantee having been given without protest, and with full knowledge of the facts. The ultimate payment of the full freight was the necessary consequence in law of the giving of the guarantee; just as much as if the plaintiff had paid it by a draft on his bankers. It must be remembered also, that, in the action in the Consular Court at Alexandria, Barker & Co. might have availed themselves of the defence that Tamvaco owed the defendant only half the freight. But no such defence was attempted; and the plaintiff having authorized Barker & Co. to pay the guaranteed amount (as is found as a fact in the special case), is now estopped from saying that only half the freight was due. It is true, the amount of the guarantee was paid under protest; but, as it was given without protest, such ultimate protest cannot affect the rights of the defendant.

Mellish, Q.C. (*Bidder* with him), for the plaintiff, was not called upon.

POLLOCK, C.B. We are all of opinion that the judgment of the Court below must be affirmed. My Brother Willes, in a very elaborate judgment, entered largely into the question of the relative rights of the shipowner under the charter-party. I think it unnecessary for me to say more upon the present occasion than that the giving of the acceptance by the charterer was not a mere loan to the shipowner, but was a prepayment of a moiety of the freight; and the receipt indorsed on the bill of lading so treats it. It is enough to say, that, when the captain signed the receipt on the bill of lading, and that document was transferred to the plaintiff bonâ fide and for value, the plaintiff was entitled to have the goods delivered to him before the bill became due, upon payment of the rest of the freight. The half freight was tendered and the coals demanded on behalf of the plaintiff, and the delivery refused by the captain unless the entire freight was paid. I do not think the rights of the parties were in the smallest degree affected by any matter subsequently accruing. The case before us being stated without pleadings, it is not necessary to consider whether the proper remedy was by an action for the wrongful conversion, or an action for money had and received. In any case, the plaintiff is entitled to recover the money which he was compelled to pay,

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in order to obtain possession of goods to the possession of which he was entitled without any payment.

MARTIN, B. I am of the same opinion; but my judgment extends only to this, that the shipowner had no lien upon the cargo in respect of the probability of the acceptance being dishonoured by reason of the acceptor's insolvency. The cargo was the property of the plaintiff, and he was entitled to have it delivered to him upon payment of the half freight only.

CHANNELL, B. I also concur, on the ground that there was no lien.

BLACKBURN, J. I am of the same opinion. I only wish to say that I express no opinion as to whether the bill of exchange which was given by the charterer was a prepayment of the half of the freight, or merely an advance on account of it. If the ship and cargo had been lost, and the underwriters had become insolvent, it might have been necessary to consider that question. But, upon the construction of the charter-party, I am clearly of opinion that the shipowner had no lien. The freight was to be paid "on unloading and right delivery of the cargo, less advances in cash at current rate of exchange:" and "one half of the freight was to be advanced by the freighter's acceptance at three months, on signing bills of lading." I cannot believe it to have been the intention of the parties that the shipowner should receive the whole freight in cash whilst the bill was current. If the voyage had been protracted so that the vessel arrived at Alexandria after the maturity and dishonour of the bill, another question would have arisen. Mr. Lewers' argument relies upon the common contract for the sale of goods, where the right of the vendor to stop them in transitu is suspended during the currency of a bill given for the price, but revives upon the bill being dishonoured. That I believe to be an exceptional rule. But, if we extend the doctrine to such a case as this, we must also extend the exception in favour of the bonâ fide taker of a bill of lading. I think there is no foundation for the argument.

MELLOR, J., PIGOTT, B., and LUSH J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Maynard, Son, & Co.*

Attorney for defendant: *J. W. Hickin.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 6.

Debtor and creditor—Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134—*Deed of assignment under s.* 192—*Reasonable provisions—Verification of debts by statutory declaration or otherwise, as the trustee may think fit—Giving credit for purchase money of real estate—Leasing unsold estate—Giving time for payment, or compounding for or abandoning bad debts.*

A deed of assignment under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), contained a clause giving power to the trustee to require persons claiming to be creditors to verify their debts or claims "by statutory declaration proved before the Commissioners of Bankruptcy or otherwise as the said trustee might think fit:"—

Held,—reversing the decision of the Common Pleas,—that there was nothing unreasonable in this provision, inasmuch as the trustee must in some way or other ascertain whether or not the party claiming is really a creditor, and the claimant may appeal to a court of equity or to the Court of Bankruptcy if his claim is improperly rejected.

The following provisions were also held not to be unreasonable:—

1. A clause giving the trustee a discretion to postpone the sale of all or any part of the real estate of the debtor, and to lease such unsold portion from year to year or for a term for such rent as he might think fit, and to give credit for the whole or any part of the purchase money, either with or without taking security for the same.

2. A discretion to determine the amount of dividends, and to pay them at such place and in such manner as the trustee might think fit.

3. A discretion to give time for the payment of debts, or to compound for or abandon such as he might consider bad.

4. A clause for ascertaining the value of securities held by creditors by valuer to be appointed by either party, or an umpire.

To an action against the defendant as the acceptor of a bill of exchange, and upon the common counts, he pleaded, that, after the accruing of the causes of action, and before action, to wit, on, &c., he made and executed a deed between himself of the first part, George Molineux of the second part, and "the several persons, companies, and partnership firms who were creditors of the defendant, of the third part," which deed, after reciting that the defendant being indebted to divers persons in divers sums of money which he was unable to pay in full, had proposed to convey and assign all his real and personal estate, subject to the existing incumbrances thereon, to Molineux, upon trust for the benefit of his creditors in manner thereinafter contained, and that the said

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creditors had agreed to give the defendant the release thereinafter contained, had (amongst others) the following provisions:—1. An assignment to Molineux, his heirs, &c., of "all the freehold, copyhold, customary leasehold, and other real estate, tenements, and hereditaments of him, the defendant, in possession, reversion, &c., and all the goods, stock in trade, plant, fixtures, household furniture and household effects, &c., of the defendant (subject to the existing incumbrances thereon, and except the wearing apparel of the defendant and his wife and children), with power to take possession and give discharges," &c., upon trust, as soon as might be, and as to the trustee might seem best, to call in, collect, and receive the said personal estate, effects, and premises, and sell and convert into money all the saleable parts of the personal estate and all the said real estate, "with power, nevertheless, for the trustee or trustees, in his or their discretion, to postpone the sale of all or any part thereof, and to lease such unsold portion, either from year to year or for a term of years, for such rents as he or they might think fit, and with power for the said trustee or trustees to make any such sales either by public auction or private contract, or partly in either mode, and either with or without the concurrence of any mortgagee or mortgagees of the property, and subject to such conditions, upon such terms, and generally in such manner as he or they might think fit (and, as to any policies of insurance, either by way of surrender to the office or offices which might have granted the same or otherwise), and to give credit for the whole or any part of the purchase money, either with or without taking security for the same." 2. A covenant by the debtor to execute all such deeds as the trustee or trustees might require. 3. That the trustee or trustees should stand possessed of the moneys to arise from such calling in, collection, receipt, leasing, and sale as aforesaid (after payment thereout of all costs and expenses of and incidental to such calling in, collection, receipt, leasing, and sale), upon trust to pay the costs of investigating the affairs of the debtor and incidental to the preparation and execution of the deed, to pay and discharge rateably and without preference or priority the debts due and owing from the debtor to the said creditors, and the surplus (if any) to the debtor, his executors, &c.: "provided always that the said trustees or

trustee should have full discretion from time to time to determine the amount of dividends which should from time to time be declared and paid out of the moneys in hand to and among the said creditors in respect of their respective debts, and *to pay such dividends at such place and in such manner as he or they should think fit.*" 4. "That it should be lawful for the said trustees or trustee to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they might have executed those presents, and that the amount or alleged amount of his or their debt or debts might have been inserted in the schedule thereto) to *verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof, by statutory declaration, proved before the Commissioners of Bankruptcy, or otherwise, as the said trustee or trustees might think fit.*" 5. That the trustees might give time for the payment of any debt due to the debtor, to accept payment thereof by instalments, composition, or otherwise, to abandon such as they might consider bad, and to make such arrangements as they might think expedient with any creditor or other person holding any portion of the debtor's estate by way of mortgage, pledge, or lien, in order to receive or discharge such mortgage, pledge, or lien, or to release the equity of redemption thereof, or otherwise. 6. That the trustees might employ an accountant or other person to assist them in winding up the debtor's affairs. 7. Proviso, that those presents should not in any wise prejudice or affect the rights or remedies of creditors against sureties, or affect any security which any creditor might have or claim for his debt; but, nevertheless, if such security should be enforceable against the debtor or his estate or effects, such creditor (unless he should consent to abandon the said security) should be entitled to receive dividends under the deed upon so much only of his secured debt as might remain after such security should have been realized, or after credit should have been given for the full value thereof, such value to be agreed upon between the creditor and the trustees, or, in case of dispute, to be ascertained by valuers or their umpire. 8. A release in general terms. 9. A proviso for the appointment of new trustees, in the event of death, &c. 10. A clause for indemnity and reimbursement of costs incurred by the trustees. 11. "That

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these presents are intended to be, and shall (so far as it lawfully may be) operate as a trust-deed for the benefit of the creditors of the debtor within the meaning of the provisions of the 192nd section of the Bankruptcy Act, 1861, in that behalf, and that it shall be lawful for the trustee or trustees from time to time, at the expense of the trust-estate, to institute, take, adopt, and defend all such actions, measures, suits, and proceedings as he or they may be advised, for the purpose of giving effect to these presents and establishing the validity thereof as such trust-deed." The plea then concluded with the usual averments.

To this plea the plaintiff demurred, the ground of demurrer being, "that the deed was not binding on the plaintiff, as it contained unreasonable provisions, and, amongst others, that the debts were to be proved as the trustees might think fit."

The Court of Common Pleas, upon the argument of the demurrer, held that the clause impowering the trustees to require creditors to verify their debts or claims *as they* (the trustees) *might think fit*, was unreasonable, and rendered the deed void: see 18 C.B. (N.S.) 735; 34 L.J. (C.P.) 198.

The defendant brought error.

Mellish, Q.C. (*Hannay* with him), for the defendant. The power conferred upon the trustees to require persons claiming to be creditors of Turner to verify the nature and amount of their debts by statutory declaration proved before the Commissioners of Bankruptcy, or otherwise as the trustees may think fit, is not, it is submitted, one to which a creditor can reasonably object. It is clear that it creates no inequality; for it in terms applies to all the creditors, whether parties assenting to the deed or not. The trustees must, even without such a provision, adopt some mode of ascertaining who are and who are not creditors. It is a power given by the cestuis que trust to the trustees for the purpose of carrying out the trusts: and, in order to find out what the power amounts to, the Court must ascertain what control a court of equity or the Court of Bankruptcy would exercise over their conduct. If the trustees improperly refuse to admit a creditor's claim, he may obtain redress by applying to the commissioners. The 164th section of the 12 & 13 Vict. c. 106, which defines the

mode of proof in bankruptcy, provides that "it shall be lawful for the Court to examine upon oath, either by word of mouth or by interrogatories in writing, every person claiming to prove a debt, or to require such further proof, and to examine such other persons in relation thereto, as such Court shall think fit." This is in substance the same thing as that. If the trustees improperly admitted a debt, any other creditor might apply to the commissioner to strike it out. It would be a breach of trust to deal otherwise with a creditor than the Court of Bankruptcy would deal with him.

[BLACKBURN, J. The clause now under discussion is similar to the 13th clause of the deed in *Strick* v. *De Mattos* (1), except that here the words "or otherwise as they shall direct" are added. That decision was affirmed by the Exchequer Chamber in *Wood* v. *De Mattos*. (2)]

The Court below found their judgment upon the case of *Leigh* v. *Pendlebury* (3); but there the provision went much further than this does, for it expressly deprived a creditor who failed to comply with the requirements of the trustees of all benefit under the deed, whereas here there are no negative words. In *Ex parte Spyer, In re Josephs* (4), a clause similar to this was held not to be objectionable: and Lord Westbury, C., goes the length of saying that no extraneous covenant will make a deed bad merely because by possibility it may be attempted to be unreasonably enforced; and that effect must be given to these deeds according to the general intent. A court of equity clearly would compel the trustees to exercise the discretion conferred upon them in accordance with the true meaning of the deed. The distinction between *Strick* v. *De Mattos* (1) and this case is extremely shadowy.

[*Biron* (who, with *Prentice*, appeared for the plaintiff,) intimated that he intended also to rely on the following objections:— that the deed gave the trustees a discretion to postpone the sale of all or any part of the real estate, and to lease such unsold portion either from year to year or for a term of years, for such rents as they might think fit, and to give credit for the whole or any part

(1) 3 H. & C. 32, 36; 33 L. J. (Ex.) 276.

(2) Law Rep. 1 Ex. 91.

(3) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(4) 32 L. J. (Bkr.) 62.

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of the purchase money, either with or without taking security for the same; that the trustees were to have full discretion to determine the amount of dividends, and to pay such dividends at such place and in such manner as they should think fit; that the trustees might give time for payment of debts, or compound for or abandon such as they should consider bad; and that the clause as to the valuation of securities held by creditors was unreasonable.]

All these are powers with which the general body of creditors have thought it expedient to invest the trustees, the better to enable them to wind up the affairs of the debtor and to distribute the proceeds. The objections are based upon the unwarrantable assumption that the trustees will act in an unreasonable manner. There may have been special circumstances in this case to induce the creditors to give the trustees power to postpone the sale of the debtor's real estate. It may have been thought advisable that it should be leased for a term, and that then the reversion should be sold. At all events the Court will not assume that the powers thus vested in the trustees will be exercised otherwise than for the general benefit of the creditors.

Biron, contrà. Upon the clause as to the verification of debts, *Leigh* v. *Pendlebury* (1) is precisely in point. That clause enables the trustees to call for such proof as they may think fit. It may be that they may call for such proof as will put the creditor in a position of difficulty to which he ought not to be subjected: and it is by no means clear that the creditor would have any remedy in case the trustees imposed upon him an unreasonable mode of proof. A deed can hardly be called reasonable which drives the party to seek redress either at law or in equity.

[MELLOR, J. What course would the trustees have taken if the deed had not contained the provision?]

The course pursued in *Ex parte Spyer* (2), viz., by calling for such proof as in bankruptcy. Then, as to postponing the sale of the real estate. The first principle of the bankrupt law is, that the estate shall be wound up and the proceeds made available for immediate distribution. Anything tending to delay or risk is at

(1) 15 C. B. (N.S.) 815; 33 L. J. (C. P.) 172.
(2) 32 L. J. (Bkr.) 62.

variance with the spirit of the law. In bankruptcy, the assignees are bound to sell for cash: to give credit, is to place the estate in jeopardy.

[BLACKBURN. J. I see nothing unreasonable in allowing the persons whom the creditors have selected for trustees to exercise a discretion in these matters.]

Mellish, Q.C., in reply, referred to the 136th section of the 12 & 13 Vict. c. 106, and to *Ex parte Lawrence, In re Beale's Assignment* (1), where it was held that the Court of Bankruptcy had jurisdiction under that section to summon a trustee under a deed of assignment for the benefit of creditors, to be examined touching his dealing with the trust-estate.

Cur. adv. vult.

The judgment of the Court (Pollock, C.B., Martin, B., Channel, B., Blackburn, J., Mellor, J., and Pigott, B.) was, February 6, delivered by

BLACKBURN, J. In this case, which was argued yesterday, we have come to the conclusion that the judgment of the Court of Common Pleas is erroneous, and must be reversed. 2 C.P. 495

The Court below have based their judgment on the case of *Leigh* v. *Pendlebury* (2), holding that the provision in the deed in question in the present case was, in effect, that, in case of failure to comply with the terms of the provision, the creditor would lose his right of having the benefit of the dividends under the deed, and that such a provision was unreasonable, and therefore vitiated the deed.

We do not wish on such a subject as this to do more than is necessary to decide the question actually before us; and we therefore refrain from expressing any opinion as to whether the provision in the deed in *Leigh* v. *Pendlebury* (2) was or was not in itself unreasonable. Neither do we decide anything on the question whether a court of law can declare a provision which applies equally to all classes of creditors, and which the statutable majority of the creditors have thought fit to adopt, void, on the ground that, in the opinion of the Court, it is unreasonable. On these points, we leave the former decisions neither confirmed nor impugned. We base our deci-

(1) 32 L. J. (Bkr.) 61. (2) 15 C. B. (N.S.) 815; 33 L. J. (C. P.) 172.

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sion on this, that we think the clause now in question has not the effect of depriving the creditor who fails to produce proof to the satisfaction of the trustee, of all benefit under the deed, and that we think the clause, as we construe it, quite reasonable.

In every case where the trust is, to distribute a fund among a particular class,—whether creditors or any other class,—the trustee must, in the absence of any express provision on the subject in the deed, determine in some way whether he will act on the supposition that the person claiming benefit under the deed is or is not of that class. The trustee cannot be bound to give the dividends to every one who claims, though others assert that his claim is fictitious: nor can he be bound to reject every claim which is objected to, though it is said that the objection is unfounded. His duty as trustee requires him in some way or other to ascertain what he thinks to be the fact, and to act on his opinion; which will cast the onus on the party dissatisfied with his decision of appealing to a court of equity, or, in the case of a deed within their jurisdiction, to the Court of Bankruptcy, to set aside that decision.

Bearing this in mind, it will be found that the provision in this deed perhaps requires no more from the creditor than would be required if the deed were silent,—at all events, requires nothing unreasonably beyond what would be thus required. It does not make the trustee an arbitrator finally to decide whether there is any debt, or what is the amount of that debt; nor does it impose any penalty on those creditors who fail to produce what the trustee thinks sufficient proof of the debt. It simply requires that the creditor shall prove his debt "by statutory declaration or otherwise as the trustee may think fit." If he does so, those who think his claim bad must appeal to the Court of Bankruptcy: if the trustee is not satisfied, the person claiming to be a creditor must appeal. We see nothing unreasonable in this.

Some other objections, on which the Court below did not adjudicate, were urged before us. We think they all failed. Those who intrust to others the task of realizing an estate, ought to select their trustees carefully; but, having done so, it is prudent to give to those trustees a discretion as to the mode in which they shall manage that estate, the time when, and the manner how, they shall sell it, so as to make the best of it. The statutable majority of

the creditors are by the Bankruptcy Act impowered to bind the minority in such matters; and we see no objection to the manner in which they have in this case exercised their authority.

The judgment must, therefore, be reversed.

Judgment reversed. (1)

Attorneys for plaintiff: *Prall & Nickinson.*

Attorneys for defendant: *Oldershaw & Son.*

(1) This decision also overrules the case of *The Brompton, &c., Waterworks Company* v. *Jennings*, 19 C. B. (N.S.) 149.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXIX VICTORIA.

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April 17.

VALIERI AND ANOTHER *v.* BOYLAND.

Ship and Shipping—Bills of Lading Act (18 & 19 *Vict. c.* 111) *s.* 3—*Fraud of shipper.*

A bill of lading represented a larger number of bales to have been shipped on board a vessel than were really shipped. This arose from the mistake of the mate, which there was some evidence to shew was caused by the fraud of the person who put the goods on board. The latter was either agent of the person named as shipper in the bill of lading or his vendor:—

Held, that there was evidence to go to a jury that the misrepresentation was caused "wholly by the fraud of the shipper or of the holder, or some person under whom the holder claimed," within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 3.

THIS was an action by the indorsees of a bill of lading against the captain of the vessel for not delivering the goods mentioned therein. The first count of the declaration was on the bill of lading and there was a second count in trover for the goods. The defendant traversed all the allegations in the first count, and to the second count pleaded not guilty, and that the goods were not the goods of the plaintiffs. Issues thereon.

The case was tried before Byles, J., at the sittings in London after last Hilary Term; when it appeared that the plaintiffs were the holders of a bill of lading signed by the defendant, the material part of which was as follows: "Shipped in good order and condition by Mr. M. M. Katinakis in and upon the steam-ship called *Brenda*, whereof is master for the present voyage James Boyland, or whoever else may go as master in the said ship, and now lying in the port of Constantinople and bound for London, ... 119 bales of skins being marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the port of London." In the margin it was written:

"K. 69	
I. 18	K. 4 bales more in dispute,
B. 32	if on board to be delivered."
119	

Only sixty-five bales marked K. were delivered to the plaintiffs.

After the bales had been put on board, a dispute arose as to the number marked K., between the mate who received and the person who delivered them; the former asserting that only sixty-five, the latter that sixty-nine, had been put on board. The mate, however, gave a receipt for sixty-nine, and wrote on it "four *over* in dispute," by mistake for "four *less* in dispute." On the faith of this receipt the defendant signed the bill of lading, but by whom it was drawn up did not appear. There was some evidence to shew that the person who put the goods on board was aware of the mistake in the receipt, and was guilty of fraud in taking it from the chief mate, but he was not Katinakis, the shipper named in the bill of lading, though whether he acted as his agent or was the person from whom Katinakis had bought the goods was not shewn.

The jury found that sixty-five bales only had been shipped, and that the mistake as to the number arose, not through any default of the defendant, but through the fraud of the person who put them on board. A verdict having been entered for the defendant, leave was reserved to the plaintiffs to enter a verdict for them for 43*l.* 15*s.* 2*d.* if the Court should be of opinion that there was no evidence proper to be left to the jury, that the misrepresentation contained in the bill of lading was caused wholly by the fraud of

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the shipper or of the holder, or some person under whom the holder claimed, within the meaning of the 18 & 19 Vict. c. 111, s. 3. (1)

Sir G. Honyman moved, pursuant to the leave reserved, for a new trial, on the ground of misdirection, and that the verdict was against the evidence. The bill of lading is conclusive as to the number of bales that were shipped, unless the misrepresentation was caused by the fraud of the shipper or of the holder, or some person under whom the holder claimed. In this case the misrepresentation arose from a mistake of the mate, and, even if there was some evidence of fraud in the shippers, that fraud was not the sole cause of the mistake. Moreover, neither Katinakis who must be taken conclusively to have been the shipper, as he is mentioned as such in the bill of lading, nor the plaintiffs, who are the holders of the bill of lading, have been personally guilty of fraud, and there are no intermediate parties. The fraud, if it existed, was the fraud of the person who actually placed the goods on board, and who that was does not appear: he may have been the person from whom Katinakis bought the goods, and have deceived him as well as the mate; and if he had any connection with the contract, he was at most the agent of the shipper, and not the shipper himself, and so not within the terms of the section of the act of parliament.

ERLE, C.J. I think there should be no rule in this case. Whether the person who put the goods on board was the agent of Katinakis, or the person of whom he bought the goods, he was acting with him, and if that person knowingly took advantage of

(1) 18 & 19 Vict. c. 111, s. 3, provides that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims."

the mate's mistake, and there was some evidence to shew that he did, he was guilty of fraud, for which Katinakis is responsible.

KEATING, and BYLES, JJ., concurred.

MONTAGUE SMITH, J. I think Katinakis cannot dissociate himself from those who put the goods on board: he must derive his rights as shipper from them, and they must have known that the entry made by the mate was an error. The mistake on the part of the mate does not prevent the misrepresentation having been "wholly caused by the fraud of the shipper;" those words only mean that the captain or other person on board the ship must not in any way be mixed up with the fraud.

Rule refused.

Attorneys for plaintiffs: *Thomas & Hollams.*

TAYLOR *v.* THE GREAT NORTHERN RAILWAY COMPANY.

April 24.

Carriers—Contract—Delivery within reasonable time—Delay caused by third persons—Railway—Running powers.

A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control.

The defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company who had, under an agreement with the defendants, sanctioned by act of parliament, running powers over their line:—

Held, that the defendants were not liable to the plaintiff for damage to his goods caused by the delay.

APPEAL from the county court of Lincolnshire. The action was brought to recover the sum, amongst others, of 4*l.* 16*s.* 6*d.*, for damage sustained by the plaintiff in consequence of a delay in the delivery of three hampers of poultry, which he had sent by the defendants' railway for the early London market. There was no special contract made by the defendants to deliver the goods in time for any particular market. The delay was wholly occasioned by an accident which occurred on the defendants' line between Hitchin and London, to a train of the Midland Rail-

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way Company, who have running powers over that portion of the defendants' line. The accident resulted solely from the negligence of the servants of the Midland Railway Company. The county court judge decided in favour of the plaintiff on the ground that as the Midland Railway Company used the said railway by the permission of the defendants, the latter were responsible for delay caused by the negligence of the servants of the former company, and, therefore, that the delivery in this case was not within a reasonable time. The defendants having appealed from this decision,

Cave (*Mellish, Q.C.*, with him), for the defendants. The defendants were only bound to deliver the goods within a reasonable time, that is, a time within which they could deliver them by using reasonable exertions, and in this case it is admitted that they did all they could in that behalf. The Railway Clauses Act (8 & 9 Vict. c. 20) s. 87, authorizes companies to enter into arrangements with each other; and the agreement with the Midland Railway Company was entered into under the powers of that act. Moreover the agreement was embodied and confirmed in 23 Vict. c. lxvii. The Midland Railway Company, therefore, do not use the line merely by the permission of the defendants, and the latter are not answerable for the acts of their servants. In *Briddon* v. *Great Northern Railway Company* (1) it was held that common carriers were not liable for delay arising from a snow storm, and here the acts of the servants of the Midland Railway Company were as completely beyond the control of the defendants as the snow storm.

Hayes, Serj. (*Thesiger* with him), for the plaintiff. The defendants are common carriers, and are bound to deliver safely goods entrusted to them. If the goods had been injured, it would have been no answer to say that the injury was caused by the negligence of the Midland Railway Company's servants, over whom the defendants had no control. A common carrier insures the time of delivery as well as the safety of the articles. He is bound to deliver the goods in a reasonable time, and that is such a period as allows ample time for him to deliver them under ordinary circumstances, and it is no answer to say that he was prevented by any-

(1) 28 L. J. (Ex.) 51.

thing except the act of God or the Queen's enemies. *Briddon* v. *Great Northern Railway Company* (1) is not in point, because there the delay was caused by the act of God, which has always formed an exception to the liability of a common carrier. The agreement with the Midland Railway Company was, it is true, made under and confirmed by the authority of parliament, but it was made for the advantage of the defendants, who have thereby brought a large amount of additional traffic on their line. If the plaintiff cannot recover in this action he has no remedy, as there is no privity between the Midland Railway Company and him.

Cave, in reply.

ERLE, C.J. I am of opinion that our judgment should be for the defendants. I think a common carrier's duty to deliver safely has nothing to do with the time of delivery; that is a matter of contract, and when, as in the present case, there is no express contract there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions. The ground upon which the decision went against the defendants was, that, as the Midland Railway Company used the Great Northern line by the defendants' permission, the defendants were responsible for a delay caused by the Midland Company on their Great Northern line. But in so deciding I think the county court judge took an erroneous view of the relations between the two companies. The legislature have declared by many acts that it is for the public advantage that railway companies should have running powers over each other's lines, and it has specially declared it to be so in the case of the present agreement, which is confirmed by 23 Vict. c. lxvii. The Midland Railway Company, therefore, were not merely using the line by the defendants' permission, but were exercising a statutory right, and the defendants were not responsible for their acts.

BYLES, J. I am of the same opinion. The first duty of a common carrier is to carry the goods safely, and the second to deliver them, and it would be very hard to oblige a carrier, in case of

(1) 28 L. J. (Ex.) 51.

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any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by law in the contract to deliver; as Tindal, C.J. puts it, when he says, "the duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally." (1) My Brother Hayes treats ordinary and reasonable time as meaning the same thing, but I think reasonable time means a reasonable time looking at all the circumstances of the case. The delay in this case was an accident, as far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable.

KEATING, J. The ground on which the county court judge rests his decision is the fact that the Midland Railway Company were using the line by the defendants' permission, but I think that this is hardly so, because the agreement was for the benefit of the Midland Railway Company and the public, as is shewn by the act of parliament.

MONTAGUE SMITH, J. I am of the same opinion. Common carriers do indeed insure to this extent, that they will safely and securely carry the goods, but not to the extent of guaranteeing their arrival at any particular time: when the question arises, it must depend on the circumstances of each case what is a reasonable time. It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that he should either delay or deviate in his course, and he is then justified in doing so. I see that Tindal, C.J., in *Davis* v. *Garrett* (2), uses the words "without *unnecessary* deviation" in describing the duties of carriers, which imply that deviation is sometimes justifiable. In the present case I think the defendants were not responsible for the delay.

Judgment for the defendants.

Attorneys for defendants: *Johnston, Farquhar, & Leech.*
Attorneys for plaintiff: *Scott & Co.*

(1) *Raphael* v. *Pickford*, 5 M. & G. at p. 558. (2) 6 Bing. at p. 725.

KYNNAIRD *v.* LESLIE.

1866
April 27.

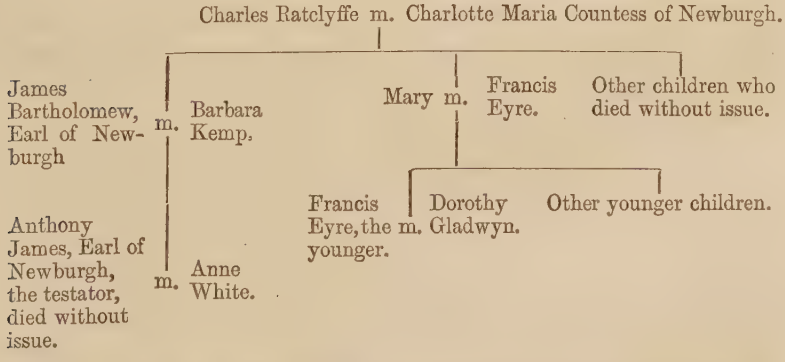
Rules of Descent—Attainder—Corruption of blood—Civil death.

A. having been attainted of treason escaped to a foreign country and there married, and had children, and was afterwards executed on the same attainder:—

Held, first, that the marriage was valid, and the children legitimate.

Held, secondly, that the descent of property between brothers is immediate, and not through their father; and that the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder.

THIS was an action of ejectment brought to try the right to certain estates in Northumberland. The case was tried before Erle, C.J., at the sittings in Middlesex, after last Trinity Term, when it appeared that the estates in question had been granted by the Crown to Anthony James, Earl of Newburgh, in 1798. He died in 1814, and by his will devised the estates to his wife for life, with remainder, after several intermediate estates, which did not take effect, to his own right heirs. At his death, his heir, unless prevented from taking by the attainder of Charles Ratclyffe, the testator's grandfather, who was attainted of treason in 1716, and whose marriage took place abroad subsequently to that event, was admitted to have been Francis Eyre, the younger, as appeared by the following genealogy:


Charles Ratclyffe m. Charlotte Maria Countess of Newburgh.
James Bartholomew, Earl of Newburgh
m.
Barbara Kemp.
Mary m. Francis Eyre.
Other children who died without issue.
Francis Eyre, the younger.
m. Dorothy Gladwyn.
Other younger children.
Anthony James, Earl of Newburgh, the testator, died without issue.
m. Anne White.

The defendant was the representative of Francis Eyre, the younger. The will of Anthony James, Earl of Newburgh, contained also a residuary devise of all his real estate, not previously disposed of, to trustees in trust for sale, and after payment of his

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debts, funeral, and testamentary expenses and legacies, in trust for his wife. The personal estate proving sufficient for the payment of the debts, legacies and other expenses, his wife elected to take a conveyance of the estates included in the residuary devise, which were accordingly conveyed to her by the trustees. It was under her will that the plaintiff in this action claimed. A verdict was entered for the defendant, with leave to the plaintiff to move to enter the verdict for the plaintiff, on the grounds that no person could take the estates in question who claimed as heir to Anthony James, Earl of Newburgh, being in lineal descent from Charles Ratclyffe, who had been attainted; and that Anthony James having for the above reason no heir who could take the estate, the estate passed under the residuary clause in his will.

Mellish, Q.C., having obtained a rule nisi pursuant to the leave reserved,

The Attorney-General, Manisty, Q.C., Charles Hall, and *Quain,* shewed cause. The plaintiff must succeed by the strength of his own title and must prove both the propositions stated in his rule. Even if the testator had had no heir by reason of the attainder of Charles Ratclyffe, the estates would not have passed under the residuary devise, but would have escheated. (1) But secondly, the attainder of Charles Ratclyffe did not prevent Francis Eyre, the younger, from inheriting the testator's estates as heir-at-law. The law of escheat is that the blood of an attainted person is corrupt, and that he cannot be the medium through whom the descent of lands from a person dying seised to his heir must be traced: thus an uncle cannot inherit from his nephew if that nephew's father has been attainted, because he must trace the descent of the lands through him. There is not, however, any personal incapacity in the children of an attainted person, for their children can inherit property from them. It is only if the descent of the lands has to be traced through the attainted person that they escheat; and it is not sufficient that the attainted person should be the origin of the natural blood through which the claim is made, if the descent of the lands is not through him. Thus the attainder of their

(1) The arguments upon this point are omitted, the Court having pronounced no judgment upon it.

father will not prevent brothers inheriting from one another because the descent of lands between brothers is immediate and not through their father; though it is necessary to look to the father to see that the children are legitimate and therefore legally brothers. If then there are two brothers, A and B, whose blood is pure, and a descendant of A dies seised of property, that property may descend to A, and from A to B immediately, and so on to any of B's descendants, and will not escheat, though the common ancestor, the father of A and B, may have been attainted. If this is a true view of the law, Francis Eyre the younger was the right heir of the testator Andrew James, Earl of Newburgh. The law is laid down as above in many places. Thus Lord Coke says (1): "if a man has issue two sons, and is after attainted of treason or felony, and one of the sons purchase land, and die without issue, the other brother shall be his heir:" and though he mentions that some have thought this would not be the case if the sons were born after the attainder, he does not adopt that suggestion; and as Mr. Hargreave says in his note to that passage, "The principle on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder." Cruise (2), after quoting Lord Coke, says, "It is, however, now settled that the descent between brothers is immediate; therefore that the attainder of the father does not prevent his sons from inheriting from each other; for though the father is medium differens sanguinis, yet he is not medium differens hæreditatis."

The two principal cases on the subject are *Hobby's* case and *Collingwood* v. *Pace*. The arguments in the former are reported at length under the name of *Boreston and Adams*, in Noy's Reports (3); the judgments are given in Leonard's Reports (4), and Palmer's Reports. (5) It decides that one brother can inherit from the other, notwithstanding the attainder of their father; and though the children appear in that case to have been born before the attainder, yet neither of the counsel in their argument suggest that this could make any difference. It is said in one of the reasons of the judg-

(1) 1 Inst. 8 a.
(2) 3 Dig. p. 325.
(3) Noy, 158.
(4) 4 Leon. 5.
(5) Palm. 19.

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ment, given in Palmer's Reports (1), that the children were born before the attainder, but this is merely for the purpose of shewing that the children's blood was not corrupted by the father's attainder, and is not the ground of the decision. In *Foster* v. *Ramsey* (2), it is expressly laid down that the fact of the children being born after the attainder does not make any difference. In *Collingwood* v. *Pace* (3), the question at issue was referred to all the justices of England, and decided by them, after solemn argument, with only three dissentients. There it was decided that the sons of an alien being naturalized could inherit from each other; and the plaintiff, who was the grandson of an alien, recovered the lands of his uncle, his father and uncle having been both naturalized. Lord Hale, in his judgment, which is given at length in Ventris's Reports, and in which the whole question is elaborately discussed, says (4) that "the father and mother are the blood natural to both the sons, but it is the law, into which by their birth or naturalization they are translated, that is the foundation of the civil or hereditary blood," and infers from this that the corruption of the blood of the father does not prevent the children possessing heritable blood. In commenting on *Courtney's* case, he puts the very case now under discussion, and says that the attainder of the grandfather would not hinder the descent of the lands. (5) The fact that the common ancestor must be referred to, to shew the relationship in natural blood, does not prove that he is in the line of legal descent; the difference between drawing descent from a person "by way of pedigree" and "by way of title" is pointed out in *Edwards* v. *Rogers*. (6) By 3 & 4 Will. 4, c. 106, s. 5, the law has been altered, and it is provided that no brother or sister shall be considered to inherit immediately from his brother or sister, which shews what was the law previously; by s. 11 that act is not to have any retrospective effect.

Rolt, Q.C., *Fleming, Q.C.*, *Mellish, Q.C.*, and *Kemplay*, in support of the rule. When the Earl of Newburgh died, the reversion to his right heirs must either have vested in his cousin Francis Eyre, or have escheated to the Crown, or have passed

(1) Palm. 19.
(2) 2 Sid. 23, 51, 148.
(3) 1 Vent. 413; Sid. 193; Bridg. 410.
(4) 1 Vent. 426.
(5) 1 Vent. 425.
(6) Cr. Car. 543.

under the residuary devise. The first question to consider therefore is, whether, if there be two first cousins and one die seised of real estate, of which he is himself the purchaser, the other can claim as heir to him notwithstanding the attainder of their grandfather. The general rule of law as to descents is that you must trace descent up to the common ancestor and then down to the person last seised. You must prove the marriage of the common ancestor, and their descent from him even in the case of brothers, and therefore must trace the descent through him in fact, if not in the forms of pleading. The rule is laid down in Cruise, vol. iii., p. 319, Stephen's Com. 4th ed. vol. i, p. 408, and in all the books. Secondly, if any one who has to be named in legally tracing the pedigree is attainted, it corrupts his blood and there can be no heir. The effects of attainder are mentioned in 2 Bl. Com., pp. 251, 254, Hale's Pleas of the Crown, vol. i, pp. 355, 356. Foster's Crown Laws, p. 63. The last says that attainder "dissolveth all relations grounded on consanguinity." There is also a very able tract by Charles Yorke on forfeiture, which contains many important arguments and shews the necessity of preserving the law of attainder strictly. There are two cases accordingly, *Courtney's* case (1), and *Grey's* case (2), which shew clearly that if the father or mother of one of two cousins is attainted the other if claiming through such father or mother cannot be his heir. The only case with respect to attainder bearing directly on the point now in question is *Hobby's* case (3), and that hardly amounts to a decision for it was appealed against, and the appeal was not prosecuted because the Crown obtained possession of the property in another way. It moreover is distinguishable from the present case because the children were born before the attainder, and the claimant was sister not cousin of the person who died seised. In one of the reports of *Hobby's* case (4), the fact that the children were born before the attainder is expressly stated to be one of the grounds of the decision; and it is so treated by Lord Coke, 1 Inst., 8 a.: the same appears from *Ratcliff's* case (5) where Britton (6), and Bracton (7) are referred to.

(1) 3 Inst. 241.
(2) Dyer, 274.
(3) Noy, 158; 4 Leon. 5; Palm. 19.
(4) Palm. 19.
(5) 3 Rep. 41.
(6) C. 5.
(7) B. 3, C. 13, fol. 130.

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But further, this exception to the general rule that the descent must be traced through the common ancestor is confined to the case of brothers claiming from each other, and is an arbitrary rule derived from the forms of pleading. In pleading, a brother can claim as brother without mentioning the father, but cousins have to trace their descent throughout; *Godfrey* v. *Dixon* (1); *Re Don's Estate.* (2) In the last two writs of right, *Davies* v. *Lowndes* (3), *Hardman* v. *Clegg* (4), the pedigrees were traced up to the common ancestor, except in the case of a nephew claiming from an uncle, where the nephew stands in his father's place, as was decided in *Collingwood* v. *Pace* (5), the great authority on the subject, though the decision was on the question of alienage, not attainder. The decision in that case rested mainly on the exception in the form of pleading in the case of brothers. Hale mentions the rule of pleading as his first reason, and Bridgman, in his judgment (6), states distinctly that the argument used by the majority of the judges, and which he had to answer, was, that since the father need not be mentioned in pleadings between brothers, as the common ancestor must in the case of more distant relatives, therefore brothers could claim from one another directly, and were not affected by the attainder of their father. In the judgment of Wyndham, J., one of the majority, which is given in the Hargreave manuscripts (7), we have this reason given: "because the descent from one brother to another is an immediate descent: that is well and clearly proved by the form of pleading 'patri et hæredi' as 'filio et hæredi,' and no pedigree to be set forth as is done in remoter degrees." In Stephenson's argument at the Bar, it is said (8), "Also the brother in making of his descent shall not make mention of the father, nor shew as he is brother, as cousin shall make;" and the Solicitor-General, in his reply (9), shews what the question was considered to be. The statute for altering the rules of inheritance (10) shews the

(1) Godb. 275.
(2) 27 L. J. (Ch.) 98.
(3) 1 Bing. (N.C.) 597.
(4) Holt's N. P. R. 657.
(5) 1 Vent. 413; 1 Sid. 193; Bridg. 410.
(6) Bridg. 419, 436.
(7) No. 56, p. 112.
(8) Noy, 158.
(9) Noy, 164.
(10) 3 & 4 Wm. 4, c. 106.

same thing. In s. 4 it provides that brothers and sisters shall not inherit directly from one another; it does not mention cousins, which shews that the exception to be abolished only applied to brothers and sisters; in s. 6, which relates to the general rule, the expression "tracing his descent through such lineal ancestor," is used implying that all but brothers have to trace their descent through the common ancestor. From s. 10 it appears that the attainder of any one through whom the descent has to be traced is fatal; and Shelford in his note to that section says, "when the party attainted need not be mentioned in the pedigree, as between two sons of an attainted father, there was nothing to hinder one brother from inheriting from the other, since the descent was immediate, as he could make himself heir to the person last seised without mentioning the father," and so shews the limit and cause of the exception. It is true that the dictum of Lord Hale would extend the exception to cousins as well as brothers, but he gives as his authority *Hobby's* case, which for the reasons given above does not support his assertion. It is clear that it is not the fact that the father could not have inherited the land if alive, which prevented his attainder forming an obstacle to his sons inheriting from one another, for then it would have been no obstacle to his brother inheriting land from his son. Lastly, the marriage of Charles Ratclyffe having been contracted after his attainder, was invalid: an attainted person is civilly dead (1), he has no power to contract for himself, though the Crown may claim lands through contracts that he has made, but that is really a prerogative of the Crown, not any capacity in him; least of all, therefore, has he power to enter into that most important contract, marriage.

The Court delivered judgment without hearing the plaintiff's counsel on the other point.

ERLE, C.J. I am of opinion that the defendant is entitled to our judgment. The action is one of ejectment, and the plaintiff must make out his own title in order to succeed; it is not, however, necessary to go into that title here further than to say that it is admitted that Francis Eyre, the younger, through whom

(1) 1 Inst. 132 b.

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the defendant claims, became entitled to the property on the death of the testator, unless his title was defeated by his having to claim through a common ancestor who was attainted before his marriage, or unless the marriage of that common ancestor was void. The first point is almost answered by the statement of the rule of law, which is, that the inheritance cannot pass through an attainted person. But the inheritance passes direct from brother to brother, whether it is for the purpose of one brother inheriting from the other, or of a descendant of one brother inheriting from a descendant of the other. The common ancestor is only mentioned to shew the consanguinity, and not because the inheritance passes through him. There was a very remarkable discussion on this point, and elaborate judgments were pronounced, in *Collingwood* v. *Pace* (1), and it has ever since been held settled law. It is stated in express terms by Blackstone (2), who also lays down distinctly, that the representatives of a deceased brother have all his rights. It has been argued on behalf of the plaintiff that the decision in *Collingwood* v. *Pace* (1) was an exception brought in to protect certain descendants of Scotch gentlemen, and was founded only on an old rule of pleading. It is hardly possible that the judges should have taken up a chance idea in that way, and Hale, C.J., expressly says that he considers it is the rule of law, and he only adduces the rule of pleading as evidence of it. The reason of the rule is apparent, because at the time when it was established the inheritance did pass from brother to brother, and not in any case to the father. In my view, therefore, there is a decision on the point which has been recognised by a course of authority, and, if it is to be overruled, it must be by a higher tribunal. Then, was the marriage of Charles Ratclyffe null? I can find no authority for this in our law: it would be a most revolting conclusion to come to, that the marriage of a man, who was capable of contracting in the land in which he was living, with a woman who was born and brought up in that land, and who might even have been ignorant of her husband's attainder, was invalid, and their children illegitimate, because the man had been attainted before he went abroad. If such were the law, I should

(1) 1 Vent. 413; 1 Sid. 193; Bridg. 410. (2) 2 Bl. Com. 255.

not shrink from enforcing it, but I believe it is not the law of our land, though it is said to be the law of France.

WILLES, J. I am of the same opinion. The case presents a remarkable aspect, because the claim which is made against the defendant, who is said to be disabled from inheriting by the attainder of his ancestor, is not made on behalf of the superior lord, but of an heir who in the ordinary course would not have succeeded: and if it could be made out that the present defendant could not inherit the estates I am not satisfied that the plaintiff would therefore be entitled to them. The case has been argued as if the cases of attainder and alienage were the same, and that as, if the person next in succession be an alien, the law takes no notice of his existence, and the estate passes on to the next heir capable of inheriting, so it would also where the person next in succession was prevented from inheriting by attainder. Without deciding this, I would say that I am not satisfied that that conclusion is just, or that the distinction between alienage and attainder pointed out in 2 Bl. Com. p. 255, would not be applicable. The law of attainder is connected with the law of escheat, which has its origin in the feudal system. The fief was granted on the understanding that the right of inheritance should continue till a case arose in which the person entitled to it could not perform the duties which were owed to the lord, and that it should then revert to him, or, in case of immediate forfeiture for treason, to the Crown. It must not, therefore, be supposed that the lands would not have escheated if the defendant had failed to make out his title.

I am clearly of opinion, however, that the corruption of blood was paramount to the line of succession along which the defendant must trace his title. The corruption of blood of an attainted person may be described as an incapacity to take or transmit an inheritance, and I apprehend that there it ceases; and that, with respect to the descendants of the attainted person, it only amounts to an incapacity to take land, with respect to which he is a "medius ancestor," as it has been said: that is to say, land which, in its descent to them must pass through him. It is not enough to create the incapacity that the person attainted was a common ancestor. I think that is the true origin of the distinction in the case of brothers, and not any difference in the form of

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pleading. If the land had been granted to James Bartholomew, and his sister Mary was the claimant, it is admitted that she could have made out her title without claiming through her attainted father, so that if the plaintiff's contention be correct, we arrive at the absurdity that if the claimant and the person last seised are further removed from the attainted person, the attainder prevails more. This is not only repugnant to common sense, but also to the origin of the law of escheat; for why should there be an escheat for the benefit of the superior lord of Anthony James, while there would have been no escheat for the benefit of the superior lord of James Bartholomew, his father, if the fee had been originally granted to him? The only question, therefore, is, whether such an anomaly is clear law. There is no decision to support it, and the reason that is adduced is, that the best ground that Lord Hale and the other judges who agreed with him in *Collingwood* v. *Pace* (1) could give for their judgment was that, in pleading, brother would claim from brother without mentioning the father's name: whereas, Sir Orlando Bridgman says that with cousins it was otherwise. I have not, however, heard mentioned, or been able to find, any authority to shew that the descendants of brothers are in a worse position in this respect than the brothers themselves, or that they cannot claim from one another without naming in their pleading the common ancestor. The origin of the rule with respect to brothers is this:—If a man purchased land ut feudum novum, and died in his father's lifetime, his brother could not inherit it, because no person could inherit the land who was not of the body of the original grantee, and the law could not presume that it had originally been granted to the father, because he was still living. This difficulty was got over by a fiction that the fief, though not "antiquum," was to descend "ut antiquum," and that, therefore, on the death of the brother, it must be assumed to have descended from an ancestor, and the surviving brother should take it. A question then arose when the father was an alien, for it was said if it is held "ut antiquum," the ancestor must have been incapable, and so the brother should not inherit. This was got over by another subtilty, for it was said that, as the ancestor was assumed, it might be assumed that he was a capable ancestor. All this applies equally to the de-

(1) 1 Vent. 413; 1 Sid. 193; Bridg. 410.

scendants of brothers claiming from one another; and I may conclude this branch of the question by stating what the pleading would have been by which Francis Eyre would have claimed the estate on the testator's death, viz.: Anthony James died seised, without issue, being the only son of James Bartholomew, all of whose brothers and sisters died without issue in the lifetime of the said Anthony James, except his sister Mary, which said Mary was the mother of Francis Eyre the younger, who was her heir, and thus cousin and heir of Anthony James; see 2 Bl. Com. 226 in point.

The other point involves a very serious question, and one entirely new, with reference to the validity of the marriage of an attainted person. The question is twofold; first, whether, if the marriage was valid, the children after the attainder were in a worse position than those born before; and secondly, whether the marriage was void altogether in consequence of the husband being an attainted person. No doubt, in our early law, the first was a question of some importance. I have looked through the passages in Bracton and Britton; it appears to be laid down in them, as was stated by Mr. Rolt, that children born before the attainder of the father could inherit from their mother, but children born after could not. It appears, however, that the rule refers to the law of escheat, which was then laid down widely in favour of the Crown, and not for the benefit of third parties. The distinction is also mentioned by Lord Coke, 1 Inst. 8a. It is only necessary for me, however, to refer to other authorities in which this is corrected and shewn not to be now law: such as Blackstone's Commentaries, vol. ii., p. 255, where he points out that Lord Coke makes a doubt as to those born after attainder, but adds that his doubt had been overruled. (1) The authorities on this point are collected in Williams' edition of Watkin on Descents, p. 3, and shew that children born after their father's attainder may inherit from one another as well as those who were born before it. The only remaining question is, whether the marriage of an attainted person is valid. Whatever question there may be, if the marriage is contracted in this country, I think that where the marriage has been contracted abroad, by an innocent woman who may not even have known of the attainder of the person she was marrying, the rule,

(1) 1 Hale, P. C. 357.

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according to which the lex loci, with some exceptions founded on public policy, governs contracts, must prevail. But further, I think that the marriage, even if it had taken place in England, would have been valid. If we consider how attainder affects persons already married, upon what grounds, previously to the Divorce Act, could a marriage have been dissolved? Only by divorce for a cause existing at the time of the marriage, or natural death. There are many instances of persons who have been attainted returning upon a commutation of their sentence to their wives. The capacity for the matrimonial state therefore is not destroyed. Moreover, an attainted person is not incapable of contracting though he cannot pray in aid the King's Courts to enforce his contracts. He can contract with those whose consciences bind them to fulfil their engagements, and he can take a grant, and grant to others even the inheritance which on office found would escheat to the Crown; and the rights so acquired by third parties may be the subject of actions in Her Majesty's courts. His contracts, too, can be enforced against him, and he cannot set up the disability arising from his own attainder. Further, I apprehend, any rule with respect to the validity of the marriage would only render it voidable, not void, unless the penalty that it should be void is actually affixed by law. This is the case, apart from statute, with other impediments, where there is a capacity and lawful authority to marry, though the marriage may be dissolved by a competent Court during the lifetime of both the parties. The dictum referred to in Co. Litt. 133a is merely metaphorical, and is so treated by Lord Coke. Reference has been made to the difference between the effects of civil death under the Code Napoleon and our own law. There is not only the distinction that by the former civil death produces ipso facto a divorce, but it is also expressly declared that the marriage of a person civilly dead shall not imply any civil rights; that is said to apply to a marriage out of France as well as to one in it; such a law is wholly foreign to our system, there are no two kinds of marriage in England, there is no such thing as a marriage without civil rights. For anything analogous to the French law, we must look to the marriages which, under Roman jurisprudence, were contracted between those who had not the right of Roman marriage, as two slaves, or a freedman

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and a slave. The only other instance of such secondary marriages are the morganatic marriages in Germany; and there, though the children of the marriage can claim none of their father's rights, yet they are legitimate members of their mother's family, and as such can inherit from one another. I protest against the idea that there can be any such marriages in England, or that the children of a person marrying after his attainder are other than legitimate, but if such marriages did exist, no doubt they would be accompanied by a similar provision to that found in Germany.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Ward & Mills.*
Attorneys for defendant: *Carlisle & Ordell.*

April 29.

IN THE MATTER OF AN ARBITRATION BETWEEN THE NORTH BRITISH RAILWAY COMPANY AND TROWSDALE AND OTHERS.

Arbitration—Award—Practice—Time for moving to set aside an award.

A motion to set aside an award cannot be made, even with the consent of both parties, later than one term after the award has been published.

THIS was an application on behalf of Messrs. Trowsdale to set aside two awards made on the 31st of October, 1865.

It appeared that Messrs. Trowsdale denied the jurisdiction of the arbitrator, Mr. Tone, by whom the awards were made, and took measures to refer the matter to another arbitrator. After some delay in consequence of this, the parties, on January 15, 1866, entered into the following agreement:—

"*North British Railway Co.* v. *Messrs. Trowsdale & Boulton.*

Memorandum of Agreement.

The company to make Mr. Tone's two awards of 31st October last rules or a rule of the Court of Common Pleas forthwith.

Messrs. Trowsdale to move the Court to set aside these awards, on the ground of want of jurisdiction in the arbitrator.

The company, in any event, to pay the costs of Messrs. Trowsdale of the motion or motions; to be taxed, if required, as between

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attorney and client. If the Court decide that Mr. Tone had jurisdiction, Messrs. Trowsdale to be at liberty to move to set aside the award on any grounds that they may be advised. If both applications are decided against Messrs. Trowsdale, or if the first be decided against them, and the second be not made, the cases to be heard again before Mr. Tone. The reference made by Messrs. Trowsdale to Mr. Stephenson not to be further proceeded with till after the 31st January inst.

Dated 15th January, 1866."

In pursuance of this agreement the awards were made a rule of court, and a motion was made to set them aside on the ground of a want of jurisdiction in the arbitrator. On the last day of last Hilary Term the Court gave judgment against Messrs. Trowsdale. (1)

C. Pollock, April 29, moved for a rule to set aside the awards on other grounds.

[BYLES, J. Are you not too late to make the motion now?]

This is not an arbitration under the statute (2), and the application to set it aside does not therefore require to be made "within the first seven days of the term next following the publication of the award to the parties." The rule that such a motion should be made during the first term after the award is published, is only a rule laid down by the Court for the benefit of the party in whose favour the award is made: here we have the written consent of the railway company to our making the motion; and in fact the delay has been for their benefit, as is seen by the fact that they agreed to pay the costs of both parties on the first motion in court.

[KEATING, J. If both parties agreed that a motion for a new trial should be made after the first four days of term, would the Court allow it to be made?

MONTAGUE SMITH, J. The agreement between the parties was made more than a term after the award was published.]

That arose from the fact of Messrs. Trowsdale going before another arbitrator.

ERLE, C.J. We cannot grant you a rule. All motions to set

(1) See Law Rep. 1 C. P. 269. (2) 17 & 18 Vic. c. 125 s. 9.

aside an award must be made within one term after the award is published. There have been two or three cases in which this rule has been deviated from, but we are not disposed to add to such precedents.

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Rule refused.

Attorneys for Messrs. Trowsdale: *C. & H. Tahourdin.*

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May 2.

Sheriff—Escape—Measure of damages.

In an action against a sheriff for suffering a judgment debtor to escape, the jury, in estimating the value of the custody, may take into account not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had remained in custody.

Thus, in an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the only son of a wealthy father, who was upwards of 100 years old; and that, shortly before the arrest, the debtor's solicitor had offered to pay a composition on his debts of 6*s.* in the pound. The judge directed the jury to give as damages the value to the plaintiff of the chance that the debt, or any portion of it, would have been extracted by the debtor's remaining in custody:—

Held, a right direction; and the jury having given substantial damages the Court refused to disturb the verdict.

THIS was an action against the Sheriff of Gloucester for an escape.

The declaration stated that the plaintiff had obtained a judgment for 1157*l.* 1*s.* 9*d.* against Thomas Hartland and had issued a writ of ca. sa. to the defendant, commanding him to take the body of Hartland in execution for that sum, together with interest and costs; that the defendant did take Hartland under the writ, but voluntarily suffered him to escape out of his custody, whereby the plaintiff lost the said sum, interest, and costs, and the profits he would have made from the employment of the same.

The defendant pleaded not guilty. Issue thereon.

The case was tried before Byles, J., at the sittings for Middlesex, after last Michaelmas Term.

The judgment debt had been reduced by the payment of 500*l.* by a joint debtor.

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On the part of the plaintiff evidence was given of the fact of the escape; that the debtor though insolvent was the only son of a man of considerable wealth, who was more than 100 years old; and that the solicitor of the debtor, one Edmonds, had offered some time before the arrest, to pay a composition for his debts of 6s. in the pound; no evidence was given that the debtor himself possessed any property.

On the part of the defendant the fact of the escape was not denied; but Edmonds stated that his offer was conditional on certain bills of exchange being given up to him, the amount of which he expected to recover by suit. The judge directed the jury to give as damages the value of the chance that the remaining debt or any part of it, would have been extracted by the debtor's remaining in prison. The jury found a verdict for the plaintiff for 197*l.*

Macnamara, having obtained a rule nisi to reduce the verdict to nominal damages, or for a new trial on the grounds of misdirection and that the jury were only entitled to take account of property to which the debtor had a legal claim in estimating the damages,

Karslake, Q.C., and *H. James*, shewed cause. The question is only as to the true measure of damages, and arises under the 5 & 6 Vict. c. 98, s. 31. The only case on the subject is *Arden* v. *Goodacre* (1), and there the Court held that the true measure of damages is "the value of the custody of the debtor at the moment of the escape," and it remains to be settled how that value is to be estimated. Any evidence which shews a likelihood that the plaintiff would have been paid his debt, if the debtor had remained in custody, is admissible, and should be considered by the jury. If the debtor's father promised to pay the debt, but just before he did so the debtor escaped, and thereupon he refused to pay anything, would not the creditor be entitled to compensation? Many persons who have no property of their own, but who live upon an allowance from their fathers, can always pay a debt when necessary to release them from custody; yet, according to the defendant's contention, a creditor could obtain no compensation for their

(1) 11 C. B. 371; 20 L. J. (C.P.) 184.

escape. A debtor often conceals his property even if he has any, and the creditor is unable to prove his possession of it.

[BYLES, J. If a man who was arrested in England, and had no property here, had large possessions in France, would not the jury be justified in taking that fact into account?]

Under Lord Campbell's Act (1), it has been held in several cases that the jury may take account of help that would have probably been given to the plaintiff by the deceased, though he might have been under no legal obligation. *Duckworth* v. *Johnson* (2), *Dalton* v. *South Eastern Railway Company* (3), *Pym* v. *Great Northern Railway Company.* (4)

Macnamara, in support of the rule. The jury have no right to consider the former position of the debtor, or the position of his friends, but only the property of which he is possessed, or to which he has some legal title, at the time of the escape. If any other considerations be admitted it will lead to much uncertainty. The cases under Lord Campbell's Act are different; in them the jury have been directed to take account of the loss of support, which the deceased considering the property he actually possessed, would have been likely to have given. The jury would not be allowed to take into consideration the fact that the deceased had wealthy relations.

[MONTAGUE SMITH, J. What if the debtor could raise money on his bond?]

That would be too vague. Even if his father had promised to pay the debt, such a promise in the eye of the law would be of no value, being without consideration. As respects the offer of a composition by Edmonds, he explained that it was entirely a speculation for his own advantage, and there was no evidence that he would have been willing to renew the offer at the time of the arrest.

KEATING, J. I am of opinion that this rule should be discharged. The rule was for a new trial, on the ground of misdirec-

(1) 9 & 10 Vict. c. 93.
(2) 4 H. & N. 653; 29 L. J. (Ex.) 25.
(3) 4 C. B. (N.S.) 296; 27 L. J. (C. P.) 227.
(4) 2 B. & S. 759; 31 L. J. (Q.B.) 249; In error, 4 B. & S. 396; 32 L. J. (Q.B.) 377.

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tion, because the learned judge did not tell the jury that they must confine their attention to the actual resources of the debtor at the time of the escape. I think it would have been a misdirection if he had done so. The detention of the body of a debtor is a remedy of a peculiar nature; the debtor's body itself is of no value to the creditor, and it is only as a means of putting pressure on the debtor that his arrest is of any avail. The measure of damages is stated in *Arden* v. *Goodacre* (1), to be the value of the custody of the debtor at the time of the escape. That value can only be estimated by seeing what the value of the effect of the pressure is likely to be. It is difficult to draw the line between matters of which the jury may, and those of which they may not, take account; and still more difficult to express the distinction in terms, and I therefore confine what I have to say to the circumstances of this particular case. It appears that the debtor had no existing available resources, but there were facts proved in the case, on which the jury might well act in finding their verdict. First, there was the offer by the attorney of the debtor to pay a composition of 6*s.* in the pound for his debts. It is true that the attorney gave an explanation of this, but the jury may not have believed him. It was also proved that the debtor was the son of an old man of large property, and it is clear that the jury might take this into their consideration, at all events in judging whether the explanation given by Edmonds of his offer was the true one. I think, then, that the value of the custody, is the value of the result which the plaintiff might reasonably have expected, under all the circumstances, to obtain from the pressure put on the debtor by imprisonment; and in this view I think the damages given by the jury were not excessive.

MONTAGUE SMITH, J. I am of the same opinion. The only guide for the learned judge at the trial was the rule laid down in *Arden* v. *Goodacre*. (1) It is said on behalf of the defendant that the jury should have been directed that the custody of the debtor was of no value unless he had some property which could have been made available for the payment of the debt. That, however, is too narrow a view. The value of the custody of the debtor depends upon the probability there is that the creditor will

(1) 11 C. B. 371; 20 L. J. (C. P.) 184.

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obtain payment of his debt by means of it. Whether he will obtain payment by such means is in all cases problematical, and in estimating the value of the custody, therefore, you may give evidence of the position of the debtor, having regard to all his surrounding circumstances, so far as they affect that probability. I think, therefore, that my Brother Byles was right in asking the jury what were the creditor's chances of obtaining payment of his debt. There was evidence of a composition of 6*s.* in the pound having been offered in payment of the debt, and that the debtor's father was wealthy and 100 years old. If that wealth consisted of land, and the debtor was the heir, it is difficult to say that the jury should not have taken into account the probability of his inheriting it; and if it was personal property, he was still one of the next of kin. I think, therefore, that the damages ought not to be merely nominal. Our judgment in this case will, however, be no guide to the measure of damages in other classes of cases, the action in this case being specially given by statute.

BYLES, J., concurred.

Rule discharged.

Attorneys for plaintiff: *Masterman, Upfill, & Brutton.*
Attorneys for defendant: *White & Son.*

Distinguished. WALFORD *v.* NARIN. [1948] 2 All E.R. 85.

Distinguished. WALFORD *v.* NARIN. [1948] 2 K. B. 176

WILKINSON *v.* EVANS.

1866 May 8.

Statute of Frauds (29 *Car.* 2, *c.* 3) *s.* 17—*Memorandum of the bargain.*

A. having sold some cheeses and candles to B., sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back to the following effect: "The cheese came to-day, but I did not take them in for they were very badly crushed. So the candles and cheese is returned":—

Held, That the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds.

THIS was an action brought to recover the price of certain cheese.

The case was tried by writ of trial before the under-sheriff of the county of Chester, when it appeared that the defendant had

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verbally ordered of the plaintiff twenty-five Dutch cheeses and some candles. The plaintiff sent the goods and also an invoice of them in the usual form.

The defendant refused to take the goods in when they arrived, and returned the invoice to the plaintiff, with the following note written on the back of it:—

"The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned. You seem to think that I complain without cause, so now you'll be able to see them as they are. I was glad to find it is the first complaint you've had from seven counties. I hope it will be the last. I am sure it will be the last for me.—Your's truly,

T. Evans,
Grocer, Welshpool."

The plaintiff agreed to take back the candles, and brought this action for the price of the cheese, which was less than 10*l*.

The plaintiff's attorney having written to the defendant to ask for payment of the goods, the defendant sent the following answer:—

"Sir—Yours this morning to hand in which you requested payment for cheese. I have to inform you that I have nothing at all to do with it. The cheese and candles were in a very bad condition, and the candles he consented to take back, so if the company signed for the cheese in good condition, it is very likely they will allow the damage without suing them; but I don't think they would sign for those in good condition, as they seemed to have very old crushes; some of the openings were quite green. As for you to sue the company in my name, you may do so if you think proper, but you must bear in mind that I will not be anything towards the cost, and if summoned for witness I must have my expenses paid. *Had they been sent by canal as I ordered them*, they would not have been damaged, that is, if they would receive them in good condition. I expect that he has the cheese in his warehouse, for I never received any notice from the company.—Yours truly,

Thomas Evans,
Grocer, &c., Welshpool."

The plaintiff was nonsuited on the ground that there was no

sufficient memorandum in writing within the meaning of the Statute of Frauds. (1)

Morgan Lloyd, having obtained a rule for a new trial,

McIntyre shewed cause. The memorandum must be a memorandum of the bargain, and shew on the face of it that a bargain has been made. In *Bailey* v. *Sweeting* (2), the letter stated that the goods had been bought, and what were the terms of the bargain; here it is nowhere stated that there was any bargain at all, for the invoice is only a statement of the price of the goods *if* they are sold, and is never intended to indicate that the goods are sold. The form is the same if the goods are only sent on approval; and the note on the back, even if it can be connected with the invoice, only says that the goods therein mentioned were returned, but does not say whether they had been bought or sent on approval. There is, in fact, no admission anywhere that there ever was a complete contract. In *Richards* v. *Porter* (3) and *Cooper* v. *Smith* (4) the memorandum was held insufficient, though a letter was written by the defendant saying that he rejected them because they did not come in time. The note on the back of the invoice implies that it was a term in the contract that the cheeses should be delivered in good condition, just as much as the letters in the above cases implied that it was a term in the contract that the goods should be delivered within a given time. In *Smith* v. *Surman* (5) the letter signed by the defendant stated that the goods were rejected because they were bad in quality, and it was held not to satisfy the statute. From the letter by the defendant to the plaintiff's attorney it would appear that it was a term of the contract that the goods should be sent by canal.

Morgan Lloyd, in support of the rule. The invoice contained all the terms of the bargain, and if that had been signed by the defendant there could have been no dispute. The fact that the defendant's signature is on the back cannot make any difference. He speaks too of *the* cheese which must mean that mentioned in the invoice. The case of *Bailey* v. *Sweeting* (2) is in point; there

(1) 29 Car. 2, c. 3.
(2) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.
(3) 6 B. & C. 437.
(4) 15 East. 103.
(5) 9 B. & C. 561.

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the defendant wrote a letter complaining that the glass was broken, here the defendant complains that the cheese is crushed; in the other cases cited the letters imply that there was an additional term in the contract as to time or quality not admitted by the plaintiff, if they do not those cases are overruled by *Bailey* v. *Sweeting*. (1) The letter written by the defendant to the plaintiff's attorney was long subsequent to the transaction and cannot affect the rights of the plaintiff.

ERLE, C.J. I think this rule should be made absolute. The contract in this case was made by word of mouth, and consisted simply in an order for some grocery, containing no specification as to quality or any other matter. The question is whether there was any memorandum in writing of this verbal contract. There is an invoice of the goods from the seller to the buyer, and on the back of it is a letter signed by the buyer which says, "The cheese came to-day, but I did not take them in for they were very badly crushed." I think that is some evidence that the invoice contained all the stipulations of the contract, and that the objection of the defendant was not to the plaintiff's statement of the contract, but to that which had taken place in the performance of the contract, namely the crushing of the cheeses. I am confirmed in this view by the letter of the defendant to the plaintiff's attorney, because he says that if the goods had been sent by the canal they would not have been crushed, and makes no objection to the terms of the contract. I think the direction to send them by the canal was not a part of the contract, but only an order given subsequently as to the mode of carrying it out. The case therefore falls directly within the authority of *Bailey* v. *Sweeting*. (1) The cases which have been referred to in which an invoice has been sent and a letter written afterwards recognising it, but the two have been held not to constitute a memorandum within the Statute of Frauds are all distinguishable, on the ground that in all of them the letter stated that the contract contained a term not stated in the invoice. In *Richards* v. *Porter* (2), and *Cooper* v. *Smith* (3), the term was that the goods should be delivered within a given time; in *Smith*

(1) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.

(2) 6 B. & C. 437.

(3) 15 East. 103.

v. *Surman* (1) that they should be sound and in good condition. It is clear that two writings alleging two different contracts can never together form a memorandum in writing of the bargain, but in this case there is no such variance.

BYLES, J. I am of the same opinion. I cannot doubt that if the defendant had written on the invoice, "bought as within mentioned" and signed it, it would have been sufficient. No doubt there is an implied term in the contract that the cheese should be in good condition, but it is an implied term and not an express one. My only doubt has been whether the memorandum on the back sufficiently identified the goods mentioned in it with those in the invoice, but it is *the* cheese and *the* candles, which I think is the same as *this* cheese and *these* candles, and must refer to those in the invoice on the back of which the words are written. If the writings can be connected without extraneous evidence it is sufficient, and then according to *Bailey* v. *Sweeting* (2), the fact that one of them contains an attempt to repudiate the bargain makes no difference.

KEATING, J. I am of the same opinion. It seems to me that the effect of this document is the same as if it had said I bought of you at the within price the goods mentioned, but they have not been sent to me in proper condition. I have not heard anything suggested as a term of the real contract not contained in the invoice.

MONTAGUE SMITH, J. I am of the same opinion. I think the letter refers to the invoice and recognises the terms of it. It is a complaint that the contract contained in the invoice has not been complied with, but an implied term in it broken. In *Cooper* v. *Smith* (3), the letter complained that the flour was not sent within the agreed time, and then Lord Ellenborough says it falsifies the parol contract proved by the plaintiff, which had no term as to the time, and so contradicts the contract and cannot be a memorandum of it.

Rule absolute.

Attorneys for plaintiff: *Lewis & Sons.*
Attorneys for defendant: *N. C. & C. Milne.*

(1) 9 B. & C. 561. (2) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.
(3) 15 East. 103.

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LANE AND ANOTHER *v.* NIXON.

Marine Insurance—Implied Warranty of Seaworthiness—Landing by Lighters.

The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine insurance does not extend to lighters employed to land the cargo.

Therefore, to a declaration on an ordinary policy on goods from Liverpool to Melbourne, "including all risk to and from the ship," the policy to endure until the goods should be discharged and safely landed at Melbourne, alleging damage by perils insured against, a plea—that the damage happened after the goods had been discharged from the ship and while they were in a lighter for the purpose of being conveyed to the shore, that the lighter was not seaworthy for the purpose, and that the damage was caused solely by such unseaworthiness—affords no defence.

THIS was action upon a policy of insurance on goods on board the ship *Queen of Beauty*, at and from Liverpool to Melbourne, including all risk to and from the ship, "beginning the adventure upon the goods &c. from the loading thereof aboard the ship at Liverpool upon the ship, &c., and so shall continue and endure, during her abode there, upon the ship &c., and further until the ship, with all her ordnance, &c., and goods and merchandises whatsoever, shall be arrived at Melbourne, upon the ship &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandise until the same be there discharged and safely landed." The policy contained the usual memorandum warranting certain goods free from average, and certain other goods free from average under three and five per cent., unless general or the ship be stranded; and also a warranty against particular average unless stranded, sunk, or burnt; general average payable as per British or foreign statement. The declaration alleged that during the continuance of the risk, the goods were damaged by perils insured against, and by being sunk within the meaning of the exception in the warranty from particular average, and that the plaintiffs were put to costs, &c.

Sixth plea. That the said injury or damage happened after the goods had been discharged from the ship *Queen of Beauty*, and while they were in a certain ship or lighter intended to

convey them from the ship *Queen of Beauty* to the shore (1), and that the said other ship or lighter was not seaworthy for the purpose on which she was so employed, and that such injury or damage was caused solely by such unseaworthiness, and not otherwise.

Seventh plea. That the damage and injury complained of occurred from the acts, neglect, and defaults of the plaintiffs and their servants and agents.

Demurrer to the sixth plea, on the ground that "there is no implied warranty of the seaworthiness of lighters employed in landing cargo;" and to the seventh plea, on the ground that "it is consistent with the plea that the damage was proximately caused by the perils insured against, and that the underwriters are liable." Joinder.

Watkin Williams (*Bovill, Q.C.*, with him), in support of the demurrers. The questions raised in this case are three: First, whether upon a policy like this there is an implied warranty on the part of the assured that the lighters employed in landing the goods shall be seaworthy for the purpose,—secondly, if not, whether the underwriters are liable for loss or damage to goods in the lighters, occasioned by unseaworthiness of the lighters,—thirdly, whether the underwriters are liable for a loss occurring through the negligence of the assured. The general principles upon which the warranty of seaworthiness rests is well settled in the case of *Biccard* v. *Shepherd* (2); but there has been no decision upon the precise point raised here. The matter was slightly glanced at in *Pelley* v. *Royal Exchange Assurance Company* (3), where Lord Mansfield said: "The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged. He took the risk upon a supposition that what was usual or necessary would be done. It is absurd to suppose, when

(1) By consent, an averment was inserted here to the effect that the lighter so used was not a lighter belonging to the ship.

(2) 14 Moore's P.C. 471.

(3) 1 Burr. 341, 348.

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the *end* is insured, that the usual means of attaining it are meant to be excluded. Therefore, when goods are insured 'till landed,' without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore." And in support of that doctrine he refers to a case of *Tierney* v. *Etherington* (1), where a loss of goods whilst on board a store-ship into which they had been transhipped in the ordinary course of the voyage, was held to be covered by the policy. In *Rucker* v. *London Assurance Company* (2), and *Hurry* v. *Royal Exchange Assurance Company* (3), the liability of the underwriters was held to attach upon goods lost or damaged whilst being landed in lighters. In *Sparrow* v. *Carruthers* (4), a distinction seems to have been taken between public and private lighters, which the Court in *Hurry* v. *Royal Exchange Assurance Company* (3) repudiate. These cases shew that the lighter is considered equivalent to the ship herself for the voyage. Emerigon (5) says: "The transport by lighter is employed only because, the vessel not being able to advance close to the shore, it is necessary to supply the case by means of lighters, which are then presumed to make part of the vessel itself. But this transport by lighters must be made from the port itself, or from the road where the ship is anchored; for, if it were a question of going up or down a river to reach the vessel, I think there would be needed either a special agreement or that the printed form of policy should contain the clause such as is seen in the forms of Bordeaux and Rouen. (6) If to discharge the goods on

(1) Guildhall, 5th March, 1743.

(2) 2 B. & P. 432, n.

(3) 2 B. & P. 430.

(4) 2 Stra. 1236.

(5) Treatise on Insurances, c. 13, s. 2 (p. 538, transl. by Meredith).

(6) By the form of Bordeaux the insurer takes the risks "from the day and hour that the goods have been or shall be loaded or embarked, *to be taken on board* the said vessel, and stowed in the same, until the said vessel has arrived at the port and harbour of —— and the said goods are discharged on shore safely without any damage." By that of Rouen, the insurer takes the risks "from the day and hour that the merchandise has been or shall be loaded in the said vessel, and even *in the hoys which shall carry the said merchandise from this city of Rouen to Havre de Grace, on board the said vessel*, and also from the time the said vessel shall have departed or shall depart from before the quay of this city of Rouen, or from before the port of the said Havre de Grace, until it has arrived and come in safety before the town of ——, and at the said place the merchandise discharged and landed, and delivered to ——."

shore it is necessary to use lighters, the insurers bear the risk, provided the object be to transport them to the quay of the port or of the road where the vessel is anchored; for, if they were intended to be carried elsewhere, the insurers would not be held." Upon a voyage from London to St. Petersburg, the goods are unshipped at Cronstadt and carried up the Neva in lighters. Could it be said that the goods are uncovered by the policy during the latter part of the transit? In an American case of *Parsons* v. *Massachusetts Fire and Marine Insurance Company* (1), insurance was made upon "specie and merchandise out, and merchandise home, at and from Boston to ports in the islands of Sumatra and Java, for the purpose of disposing of the outward cargo, and procuring a return cargo, and thence to the port of discharge in the United States, with liberty to touch at the usual places, and trade there." At Labouaga, in the island of Sumatra, the captain contracted with Dato Bassow, the chief magistrate there, to exchange a chest of opium for a certain quantity of pepper and for dollars. When pepper of a value equal to two-thirds of the opium had been delivered on board, Dato requested that the opium should be landed and weighed, and said he would pay the balance in dollars. The opium was accordingly landed. While they were occupied in weighing it, Dato demanded new terms of agreement, upon which the captain proposed to take the opium on board, and pay in dollars for the pepper which he had received. Dato consented to this proposition, but just as the opium had been put on board of the boat to be carried back to the ship, and while it rested on the gunwale of the boat, his men seized it in pursuance of a previous design to plunder or cheat the captain. It was insisted, in behalf of the insurers, that the risk on the opium had ended as soon as it was put into the scales to be weighed. Mr. Justice Sedgwick, for the Court, said: "The insurers insured the plaintiff against the restraint and detention of princes, for the purpose of disposing of the outward and procuring a return cargo; and, while executing the purpose, the property was violently seized. The goods were as much protected by the policy in the boats, while employed as auxiliary to the voyage, as they were on board the ship."

(1) 6 Mass. Rep. 197: cited 1 Phillips on Insurance, s. 970.

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[KEATING, J. In *Strong* v. *Natally* (1), where the underwriters were held not to be responsible for goods unloaded into a lighter, Sir James Mansfield disposes of the case, upon the authority of *Sparrow* v. *Carruthers* (2), on the ground that the plaintiff (the consignee) had taken the goods into his own care and possession; and Rooke, J., observed that the Court did not intend, in *Hurry* v. *Royal Exchange Assurance Company* (3), to shake the authority of *Sparrow* v. *Carruthers* (2), but only to decide the case then before the Court upon its own circumstances.]

But for the fact relied on by Sir J. Mansfield, the Court in that case were prepared to hold that the policy covered the goods whilst on board the lighter. In *Stewart* v. *Bell* (4), where the policy was upon goods to a port in Jamaica, "till landed," it being proved to be usual at that port to land the cargo in shallops from ships of the size of that which carried the goods insured, the Court said, "The underwriter should inquire what is the usual mode of landing the goods." (5) Then, the implied warranty of seaworthiness does not extend to lighters used for the landing of goods at the port of destination: that attaches to the ship only at the commencement of the voyage. It could hardly be contended that there would be any warranty if the ship had been discharging the cargo in her own boats. The warranty of seaworthiness attaches only at the time the vessel sails, and to the extent that the thing is capable of: *Gibson* v. *Small* (6); *Dixon* v. *Sadler* (7); *Thompson* v. *Hopper* (8); *Knill* v. *Hooper* (9); *Burges* v. *Wickham* (10); *Clapham* v. *Langton.* (11) If the voyage be one which consists of several portions or stages, the warranty is fulfilled if the vessel is sufficient for each particular stage as it attaches: *Bouillon* v. *Lupton.* (12) *Phillips* v. *Headlam* (13) and *Redman* v. *Wilson* (14) are also authorities to shew that the warranty of seaworthiness

(1) 1 B. & P. (N.R.) 16.
(2) 2 Stra. 1236.
(3) 2 B. & P. 430.
(4) 5 B. & A. 238.
(5) See these cases commented on in Marshall on Insurance, 4th edition, by Shee, p. 199.
(6) 4 H. L. C. 353.
(7) 5 M. & W. 405; 8 M. & W. 895.
(8) 6 E. & B. 172; 25 L. J. (Q.B.) 240.
(9) 2 H. & N. 277.
(10) 3 B. & S. 669; 33 L. J. (Q.B.) 17.
(11) 5 B. & S. 729; 34 L. J. (Q.B.) 46.
(12) 15 C. B. (N.S.) 113; 33 L. J. (C.P.) 37.
(13) 2 B. & Ad. 380.
(14) 14 M. & W. 476.

applies only to the condition of the ship at the commencement of the voyage. The Privy Council, in *Biccard* v. *Shepherd* (1), adopt the rule as laid down by Parke, B., in *Dixon* v. *Sadler*. (2)

Sir G. Honyman, contrà. The underwriter insures against sea perils, not against the vice of the thing to be carried, or against losses arising from the defective state of the vessel in which the goods are shipped. The principle upon which the implied warranty of seaworthiness rests is well stated in the judgment of Cockburn, C.J., in *Burges* v. *Wickham*. (3) It is conceded that the ship's boats must be seaworthy, and that the insurers would not be responsible for a loss arising from their insufficiency. All the authorities agree that "seaworthiness" is a flexible term: see the judgment of Parke, B., in *Small* v. *Gibson* (4), and that of Erle, J., in *Thompson* v. *Hopper*. (5) "The case," says Erle, J., "of a policy on a ship at and from London on a whaling voyage to the north is almost too trite to be quoted: the warranty is of four gradations,—fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; then fit for whaling. The policy attaches if the ship is fit for dock; but the warranty is broken, if the other stages of fitness are not completed." That is precisely what is contended for here: the warranty attached when the ship was in dock in London, when she commenced her voyage to Melbourne, and upon the lighters when the ship arrived at Melbourne. There is no difference in principle between the case last cited and this. The same doctrine is affirmed by the Privy Council in *Biccard* v. *Shepherd* (1), and by this Court in *Bouillon* v. *Lupton*. (6) The vessel and all that belongs to the vessel must be fit at the time she enters upon each stage of the voyage.

[BYLES, J. Suppose the goods were landed by means of rafts or catamarans, or on the backs of coolies, would the implied warranty attach to each of these modes of landing?]

It is submitted that it would. Then, as to the seventh plea,

(1) 14 Moore, P.C. 471.

(2) 5 M. & W. 405; 8 M. & W. 895.

(3) 3 B. & S. 669, 683; 33 L. J. (Q.B.) 17.

(4) 16 Q. B. 141, 151.

(5) 6 E. & B. 177; 25 L. J. (Q.B.) 240.

(6) 15 C. B. (N.S.) 113; 33 L. J. (C.P.) 37.

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a plea substantially similar was held good in *Thompson* v. *Hopper*. (1) It charges the plaintiff with personal misconduct.

[BYLES, J. The seventh is a very ambiguous plea. (2)]

W. Williams, in reply. It is important to ascertain upon what foundation the doctrine of implied warranty rests. It operates as a condition, and puts an end to the risk from the time of the breach of it; or, in other words, it defines and limits the subject-matter of the insurance. "The warranty," says Dr. Duer (3), "is not implied from the terms of the policy, but rests on the supposition that the seaworthiness of the vessel is the basis of the contract in the understanding of the parties." It depends upon the usage, and upon the knowledge of the assured, and his means of putting the ship in a proper state. Here the plaintiff could have no means of knowing about the state of the lighters at Melbourne.

[ERLE, C.J. Nor could he of the state of the ship herself.]

In *Gibson* v. *Small* (4), Martin, B., says: "In voyage-policies the owner knows, or has the means of knowing, the condition of his ship, the sufficiency of his stores, and the competency and fitness of the master and crew. It is his bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, 'that the ship should be tight, staunch, and strong, and in every way fitted for the voyage,' or, in other words, 'seaworthy;' and it may most properly be implied that, in his contract with the underwriter, the owner shall be taken to warrant, as the foundation of the contract, that the ship, the subject-matter of the insurance, is or shall be at the time of sailing a seaworthy ship, and that the premium is to be calculated on the principle that the perils insured against are to be borne by a vessel prepared to resist, and, if possible, to overcome them." And in the same case, Lord Campbell says (5): "The only consideration pointed out for extending the implied condition of seaworthiness to time-policies, which made any impression upon me, is, that it does

(1) 6 E. & B. 172; 25 L. J. (Q.B.) 240.

(2) It was agreed that the judgment on this plea should be reserved until after the trial of the issues in fact.

(3) Duer on Marine Insurance, lect. xiv. s. 18, vol. ii. p. 671.

(4) 4 H. L. C. at p. 370.

(5) 4 H. L. C. at p. 421.

extend to voyage-policies on goods, although the assured can have no control over the repairs or equipment of the ship. (1) But between the assured on goods and the underwriter there is the shipowner, who must be considered the agent of the assured; and he does undertake that the ship shall be tight, staunch, and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against the underwriter, but he obtains a full indemnity by suing the shipowner; and thus, either with the shipowner or the underwriter, the merchant is secure; so that the implied condition in his policy in no respect interferes with the object of insurance or with the interests of commerce." The implied warranty, it is submitted, extends only to the period at which the shipowner has the means of seeing that the ship is seaworthy, not to her condition at each stage of the voyage. The argument on the other side is confined to craft; the warranty of seaworthiness, however, goes beyond that: it extends to the loading: *Foley* v. *Tabor*. (2) The lighter must not be overloaded, and it must have a competent crew. In *De Cuadra* v. *Swan* (3), where the vessel was in the course of the voyage so damaged by perils of the sea as to be incapable of repair so as to pursue her voyage with effect, and the goods were transhipped, a plea that the substituted vessel at the time the goods were first at risk on board of her was not seaworthy, was held to be a bad plea.

Sir G. Honyman. That was an insurance on freight.

ERLE, C.J. I think our judgment upon this plea should be for the plaintiff. The action is upon a policy on goods from Liverpool to be delivered at Melbourne. On the ship's arrival at Melbourne, the goods were put into lighters, and, according to the statement in the sixth plea, the lighters were unseaworthy, and in consequence of such unseaworthiness of the lighters the goods were damaged. The question is, whether that affords a defence to an action upon the policy. There is no doubt that there is an implied warranty of the seaworthiness of the ship, and that if

(1) The question in the case being, whether or not the implied warranty of seaworthiness extended to time-policies.

(2) 2 F. & F. 663.

(3) 16 C. B. (N.S.) 772.

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that warranty is not complied with the policy is avoided. That is the construction which has been put upon this form of policy for at least a century. But there is no instance of the question having been raised as to the seaworthiness of lighters, though doubtless many losses must have occurred through landing goods by means of lighters. The only cases where it appears to have been glanced at were, one where the assured took the goods in his own lighter, the other where the assured dispensed with the attendance of the lighterman and the loss complained of occurred by reason of the lighterman's absence. Neither of these cases affords any argument in favour of the defendant. I think that when the ship is seaworthy at the commencement of the voyage the insurer is responsible for all the ordinary incidents arising in the course of the voyage, and that where, as here, the contract of insurance is upon goods from their shipment until their landing, if one of the ordinary incidents of the voyage is the hiring of local lighters, the insurer must bear the consequences of such local lighters not being qualified to land the goods in safety.

BYLES, J. I am of the same opinion. Mr. Williams has cited many authorities to shew that the insurance covers the transit to and from the ship: and, amongst others, he has referred to a book of very great authority, viz. Emerigon. That learned author distinguishes the ascent and the descent of rivers, a matter which does not arise here: and he states it as the general rule in the law of insurance, that the policy covers not only the voyage from port to port, but also the transit of the goods to and from the ship. In addition to that, there is the case of *Rucker* v. *London Assurance Company* (1), where it was held that the obligation of the insurer continues until the safe discharge of the cargo. There was another case cited of *Hurry* v. *Royal Exchange Assurance Company* (2), which as I gathered the facts from the statement of counsel seems to contemplate the case of lighters. There is also the American case of *Parsons* v. *Massachusetts Fire and Marine Insurance Company* (3), where the boat-load of opium was plundered on its way back from the shore to the ship: and further, there are the observations

(1) 2 B. & P. 432, n.

(2) 2 B. & P. 435.

(3) 6 Mass. Rep. 197.

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of the Court in *Stewart* v. *Bell.* (1) Upon these authorities it is plain that the policy in ordinary cases attaches until the goods are landed. If there be any exception to that rule, it is singular that during so many years, with all the research which has been made, not only amongst the English authorities, but also amongst those of the Continent and of America, no case has been produced before us: and it is but reasonable to suppose that there are none. I incline to agree with what Mr. Williams says as to the implied warranty of seaworthiness. If the policy is effected by the shipowner, it is a condition which he can and ought to perform. Even where the insurance is upon cargo, the owner has his remedy against the shipowner, or he may refuse to put his goods on board if the vessel be not seaworthy. But how different is the case of lighters or other means of disembarkation at the other end of the voyage. The owner of the goods has no means of knowing anything about the lighters or other craft to be employed; of their soundness, of their capacity to carry the goods, of the sufficiency of their crews, or the means of controlling or regulating them. Besides, if this is the law as to lighters, it would be the same as to rafts and catamarans, or where, as on the coast of Madras, coolies or elephants are employed for the purpose, or it may even extend to a plank through the unsoundness of which the goods may be dropped into the sea and lost or damaged. I cannot entertain any doubt that this policy covered the goods whilst in course of removal from the ship to the shore by means of lighters: and I think that if we expressed any doubt we should create much disquietude and alarm amongst merchants in the city of London.

KEATING, J. I am of the same opinion. The implied warranty of seaworthiness is here sought to be extended far beyond anything to which it has ever yet been extended. Hitherto it has been always considered to apply to the state of the vessel at the commencement of the voyage. If this had been the case of a transhipment of goods in the course of the voyage, or the voyage could have been said to consist of several stages, as in some of the instances adverted to, it might have admitted of a different consideration. But here, the employment of lighters to land the goods seems to be a usual and ordinary incident of such

(1) 5 B. & A. 238.

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a voyage, and has no reference whatever to the implied warranty of seaworthiness. I think it would be a dangerous step to extend that warranty in the manner contended for by the defendant's counsel. I think the sixth plea is clearly bad.

MONTAGUE SMITH, J. I am of the same opinion. The implied warranty of seaworthiness is one which the law has engrafted upon the express contract of insurance. I think we are not warranted in extending it further than it has already been carried, which we clearly should be doing if we decided in favour of the underwriter in this case. The contention on the part of the defendant has been that the voyage consists of various stages, and that the warranty of seaworthiness applies to each of them. If the landing of the goods by means of lighters could have been said to form one of several stages of the voyage, possibly the principle contended for might have been extended to it. But I do not think it can in any sense be said to be a stage of the voyage. It is rather an accessory or incident of the voyage. Not only is it implied that the obligation of landing the goods is to fall upon the shipowner, but the owner of the goods has in distinct and express terms insured himself against risk to and from the ship. This particular risk was distinctly contemplated and in terms provided against. The goods were lost through a peril of the sea in being conveyed from the ship to the shore in the ordinary and accustomed manner. There is nothing to justify the extension of the implied warranty of seaworthiness to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done. The landing of goods in boats or lighters frequently takes place on dangerous coasts; and, if the master had to inquire in all cases into their sufficiency or seaworthiness, much delay and risk must necessarily arise. It would be making the right of the assured to recover depend upon the merest accident at a distant port. For these reasons, I am of opinion that the implied warranty of seaworthiness does not attach upon lighters employed to land the cargo at the port of discharge, and consequently that the sixth plea is a bad one. The averment that the injury or damage was caused solely by the unseaworthiness of the lighters, and not otherwise, does not carry the matter any further. The policy is avoided or not, where the

implied warranty attaches, according as the warranty is broken or not, quite independently of whether the loss is or is not connected with the breach of warranty.

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Judgment for the plaintiffs on the sixth plea.

Attorneys for plaintiffs: *Cotterill & Sons.*
Attorneys for defendant: *Waltons & Bubb.*

STANHOPE, APPELLANT; THORSBY, RESPONDENT.

April 27.

Contagious disease in Cattle—11 & 12 *Vict. c.* 107—*Licence to remove Cattle*—*Jurisdiction of Justices*—*Practice*—*Recognizances on a case stated under* 20 *&* 21 *Vict. c.* 43.

On the hearing of an information, under 11 & 12 Vict. c. 107, s. 4, for removing cattle without a licence, the magistrates, on the production of a licence, have no jurisdiction to inquire into the sufficiency of the evidence upon which it was granted.

The recognizances required to be given by the appellant on a case stated by justices, under 20 & 21 Vict. c. 43, s. 3, need not be given within the three days mentioned in s. 2: it is enough if this is done before the case is given out by the justices.

CASE stated by justices under the 20 & 21 Vict. c. 43.

At a petty sessions held at Horncastle, in the parts of Lindsey, in the county of Lincoln, on the 3rd of March, 1866, an information preferred by the respondent against the appellant, came on to be heard before the justices. The information charged the appellant with having unlawfully removed two cows and sixteen bullocks from a certain place within the parts of Lindsey, to wit, Revesby, to a certain other place, to wit, Tattershall, also within the said parts, over and along a certain public highway there (not being a railroad), such cattle not being then and there fat cattle removed for the purpose of slaughter with the licence of a justice of the peace for the said parts duly granted under the authority of the order thereinafter mentioned, nor cattle removed from one part of a farm to any other part of the same farm contiguous thereto and in the occupation of the same person, with the licence of a justice of the peace for the said parts, contrary to a certain order of sessions of the 16th of January, 1866, and contrary to the statute, &c.

At the hearing, the order of sessions of the 16th of January,

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1866, was put in. This order was an order made by the justices of the peace for the parts of Lindsey in quarter sessions assembled, being "the local authority" appointed by the order in council of the 16th of December, 1865, under the 11 & 12 Vict. c. 107, s. 4, and the material parts of the order were as follows:—

"The justices present declare, that, with a view to prevent the spreading of the said disorder (the cattle plague), it is expedient, and they do accordingly declare and give notice as follows, that is to say,—

First, that, between the 19th of January, instant, and the 1st of March next, no cow, heifer, bull, bullock, or calf, sheep, lamb, goat, or swine, shall be brought or sent to any public fair, market, or place within the said parts of Lindsey for the purpose of exhibition or sale.

Thirdly, that it shall not be lawful between the dates aforesaid to remove any cow, heifer, bull, bullock, ox, or calf, from place to place within the said parts of Lindsey over, along, or across any highway or public road (not being a railroad), except fat cattle for the purpose of slaughter, which fat cattle may be removed for that purpose with the licence of a justice of the peace of the said parts, and shall before removal be marked by part of the hair being conspicuously clipped off in the form of a cross from one of the hind quarters; and in the licence the justice shall state the name and residence of the seller, that he has been satisfied, *by the evidence of an inspector or otherwise*, of the healthiness of the animal, that the animal has been in the seller's possession thirty days at least immediately previously to such removal, and that no case of cattle plague has occurred within one mile from the premises from which such removal is to take place during six weeks immediately preceding such removal; and that the licence shall be in force forty-eight hours from its date, and no longer: and also except any other cattle which may be removed from one part of a farm to any other part of the same farm contiguous thereto and in the occupation of the same person, with the licence of a justice of the peace of the said parts.

Lastly, notice is hereby given that every person offending against the orders and regulations hereinbefore contained will be liable to forfeit for such offence a sum not exceeding 20*l.*"

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It appeared that the appellant, being in possession of a quantity of fat cattle, sent on the 28th of January, 1866, to Moses Elmhirst, Esq., a justice of the peace for the parts of Lindsey, a letter of which the following is a copy:—

"Dear Elmhirst,—Mr. Bell has become rather frightened at the plague being at Mareham-le-fen (two miles from my farm), and, my feeding beasts being pretty fat, he wishes to send them at once to Tattershall, to Great Northern station, to be sent to London to-day and sold and killed there to-morrow morning. There are ten short-horn steers, two cows, and six Scotch steers.

Mr. Bell sends a note to the Horncastle inspector to give a warrant for their health, without which it must be understood that your order is not to be used. I also want a certificate for the removal of my animals across the road, with the inspector's permission.—J. Banks Stanhope."

With this letter was inclosed a memorandum from Mr. Bell (Mr. Stanhope's steward), from which the following is an extract:—

"Mem. for Moses Elmhirst, Esq.

List of beasts belonging to James Banks Stanhope, Esq., intended to be forwarded by railway from Tattershall station to Manchester:—

Ten short-horned bullocks (5 white and 5 roan).
Two short-horned cows (1 white and 1 roan).
Six Scotch bullocks (4 dun and 2 red).

G. Bell, Revesby, Jan. 28, 1866.

I certify that the above-stated beasts are all healthy, so far as I know; but they will only be forwarded by the order of an inspector, which is applied for.—G. B."

Mr. Elmhirst, on this application, granted a licence in the form settled by the quarter sessions at which the above-named order was made and supplied under the direction of a court to the justices for the parts of Lindsey. The following is a copy of the licence:—

"Lincolnshire. Lindsey. Licence to remove cattle.

I hereby permit the removal of two cows, short-horned, one roan, one white; sixteen bullocks, ten short-horned, five roan, five white; six Scotch, four dun, two red, the property of James B. Stanhope, Esq., M.P., of Revesby, to London or Manchester, to be removed

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from Revesby to London or Manchester, viâ Tattershall station, being for immediate slaughter; it appearing to me that the disease has not appeared within one mile of the premises from which the cattle are to be removed within six weeks from this date, the same are not infected by the disorder generally designated 'The Cattle Plague,' and have been thirty days at least in the possession of the applicant for this licence.

This licence shall remain in force until 2.15 P.M. of Tuesday next, the 30th of January, 1866. Given under my hand, &c.

Moses Elmhirst, a justice," &c.

On the back of the licence were the following notes:—"None of the animals named within may be removed between an hour after sunset and an hour before sunrise. The holder of this licence must produce and shew it to any person requiring him to do so. Within two days after the expiration of the time for which this licence is granted, it must be sent (if by post, pre-paid) to the justice of the peace who granted it. Animals before removal to be marked by part of the hair being conspicuously clipped off in the form of a cross from one of the hind-quarters. Penalty 20*l*."

A certificate of the inspector, that the appellant's cattle were healthy, having been obtained, the cattle named in the information were on the 29th of January, 1866, removed under this licence along the highway from Revesby to Tattershall railway station, en route for Manchester, and there sold.

It was contended on the part of the appellant that the cattle were proved to be fat cattle removed under the authority of a licence duly granted in compliance with the terms of the order, and that the information ought therefore to be dismissed. On the part of the respondent it was contended that the licence granted by Mr. Elmhirst was invalid, and did not authorize the removal.

Mr. Elmhirst was called as a witness on the part of the respondent. He stated in substance as follows:—I am a justice for the parts of Lindsey, and act at the Horncastle petty sessions. On the 28th of January, I received the letter of that date from Mr. Stanhope, inclosing a communication from Mr. Bell. I had no other evidence, when I granted the certificate, than the letter from Mr. Stanhope, and the letter from Mr. Bell. I had no other evidence that there was no cattle plague within one mile of Mr. Stan-

hope's premises than the statement in his letter about Mareham-le-fen. I was aware that there was cattle plague at Mareham; but I was not aware that it was nearer. I had no evidence that it was nearer. I read the letter as if it contained a statement that there was no cattle plague within a mile.

John Bett, a tenant of Mr. Stanhope, who was also called as a witness by the respondent, stated that his farm-yard was *from half to three quarters* of a mile from Mr. Stanhope's; and that he had had cattle plague there: but it did not appear that this fact had been communicated to the appellant, or to his steward, Bell.

The justices found that there was no fraud on the part of the applicant in obtaining the licence; but they ruled that, in point of law, it was the duty of a person applying for a licence to shew affirmatively to the justice to whom the application was made, that there was no cattle plague within one mile of the farm from which the removal was to take place, and that the appellant ought to have shewn this, which his letter of the 28th of January did not do. They therefore held that the licence granted by Mr. Elmhirst was a void licence, and did not authorize the removal; and they convicted the appellant in a penalty of 20*l.* and costs.

A case was demanded on the 6th of March (the information having been heard on the 3rd); and on the 10th the appellant entered into the recognizances required by the 20 & 21 Vict. c. 43; and the case was signed by the justices on the 26th.

The question for the decision of the Court was, whether the ruling of the justices as to the invalidity of the licence on the ground stated above was correct. Should the Court be of opinion that it was correct, the conviction was to be affirmed; but, if the Court were of opinion that it was incorrect, the conviction was to be quashed.

On the case coming on for argument,

Manisty, Q.C., for the respondent, urged a preliminary objection. The 2nd section of the statute enables the party aggrieved by the decision of the justices to apply to them within three days to state a case for the opinion of one of the superior courts:

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and, by s. 3, the party appellant is required, *at the time of making such application*, and before a case shall be stated and delivered to him by the justices, to enter into a recognizance conditioned to prosecute such appeal without delay, and to submit to the judgment of the superior court. The true construction of this section is, that the recognizance shall be entered into within the time limited for making the application, or before the giving out of the case, if within the three days. If that be not so, practically there is no limit. In *Chapman* v. *Robinson* (1), it was objected that the recognizance must be entered into *at the time* of applying for the case; but the Court held that it was sufficient if done at any time *within the three days*. Here, the hearing was on the 3rd of March, the application for a case on the 6th, and the recognizance was not entered into until the 10th. This clearly was too late.

[BYLES, J. The appellant is required "within three days after receiving the case to transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party." In *Morgan* v. *Edwards* (2), the Court of Exchequer held that the transmitting the case to the Court, and the giving notice with a copy of the case to the respondent within the time mentioned, are conditions precedent to the right of the appellant to have the case heard: and they would not allow the respondent to waive the objection.]

Bovill, Q.C. (*Hannen* with him), contrà. Every object of the act is attained by holding that the appellant must enter into the recognizance before he receives the case. It is true, the words of s. 3 are, "at the time of making such application, *and* before a case shall be stated," &c. But, if the argument on the respondent's part is correct, those latter words are altogether superfluous. The Court of Queen's Bench have decided in *Chapman* v. *Robinson* (1), that it is not necessary to enter into the recognizance at the time of applying for the case. If so, there is no other limit of time fixed by the act than "before the case shall be stated and delivered to the appellant." The 3rd section goes

(1) 1 E. & E. 25; 28 L. J. (M.C.) 30.
(2) 5 H. & N. 415; 29 L. J. (M.C.) 108.

on to provide for the costs of preparing the case; "and the appellant shall *at the same time*, and before he shall be entitled to have the case delivered to him, pay to the clerk to the justices the fees for and in respect of the case and recognizances," &c. The fees must depend upon whether or not the case is granted, and their amount upon the length and difficulty of the case. It never could have been intended that all that should be done within the three days. Section 4 provides that the justices may refuse a case where they think the application frivolous; and by s. 5, where the justices refuse to state a case, the Court of Queen's Bench may by rule compel them to do so. The whole scope of the act shews that the time for entering into the recognizance is before the case is delivered out, and the amount for which the recognizance is to be given is ascertained.

[ERLE, C.J. We are all of opinion that the time for entering into the recognizance is not limited, as Mr. Manisty suggests, to three days; and that the recognizances here were entered into in time. (1)]

Bovill, Q.C., then submitted that it was not competent to the sessions or to this Court to go behind the licence and see what was the evidence upon which it was granted. The magistrate who grants the licence for the removal of the cattle has no power to summon witnesses. He acts upon the best information he can get; and in many cases upon his own knowledge. In the absence of fraud, it is not competent to any tribunal to inquire whether or not the licence was granted upon competent evidence.

Manisty, Q.C., for the respondent. The justice admits that he had *no* evidence before him. The letter upon which he acted clearly appears from the testimony of Bett before the petty sessions to have been a mistake. It is a condition precedent to his power to grant the licence, that the justice shall be satisfied that there is no disease within a mile of the place from which it is proposed to remove the cattle; whereas here it was clearly shewn that it was raging within half or three quarters of a mile from the appellant's farm.

[KEATING, J. If the licence can be impeached for insufficiency of evidence, no man can safely act upon such a document.]

(1) See *Norris* v. *Carrington*, 16 C. B. (N.S.) 10, and the cases there referred to.

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This is not a case of insufficient evidence. There was a total absence of evidence.

Hannen, in reply, was not called upon.

ERLE, C.J. I am of opinion that the conviction in this case was wrong. The power to convict is given to the justices if cattle are removed without a licence. Here the cattle were removed under the authority of a licence from a magistrate. The conviction, therefore, is in point of law wrong. The appellant had applied to Mr. Elmhirst for a licence; and the justices find that there was no intentional deception. They considered that they were entitled to go, as it is called, behind the licence, and to inquire into the quantity of evidence upon which the magistrate who granted it acted. I think they had no power to do so. Mr. Stanhope acted without any intention to do wrong; and I must say that the magistrates who convicted him have acted with an intention resolutely to do their duty in a matter of the highest importance to the public. But I am obliged to come to the conclusion that they had no right to inquire into the sufficiency of the information upon which Mr. Elmhirst acted.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Conviction quashed.

Attorneys for appellant: *Freshfields & Newman.*

Attorneys for respondent: *Scott & Co.*

April 27

TAYLOR *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Practice—County Court Appeal—Costs.

An application for costs on an appeal from a county court will not be entertained unless made at the time the case is disposed of.

THIS was an appeal from a county court, which was argued on 24th of April (1), and in which the defendants, the appellants, obtained judgment.

Cave (April 27) asked for the costs of the appeal. He referred

(1) *Ante*, p. 385.

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to *Schroder* v. *Ward* (1), where it was laid down that costs on appeals from county courts were always to be awarded to the successful party, unless there be something very exceptional in the circumstances.

ERLE, C.J. To bring the party within that rule, the costs must be asked for at the time the case is disposed of.

Costs refused. (2)

Attorneys for defendants: *Johnston, Farquhar, & Leech.*
Attorneys for plaintiff: *Scott & Co.*

BOLTON *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Jan. 19.

Vendor and Purchaser—Sale of Goods—Unpaid Vendor—Stoppage in transitu.

On the 12th of July, 1864, W. sold P. eleven skips of cotton twist, then lying at the defendants' station at S., to be delivered for P. at B. station. Three of the skips were delivered on the 22nd, and paid for; but P. objecting to the weight and quality, declined to take any more of them. On the 17th of August, four more were sent to B. station, and an invoice of the eight was sent to P., with an intimation to him that four had been forwarded, and that the remaining four were lying at S. station waiting his instructions. P. immediately returned the invoice, and wrote to W., saying that he declined to take any more of the twist. On the 1st of September, W. sent an order to S. station, directing the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and were taken by P.'s carman to his mill, but were immediately returned by P.'s orders; and the whole eight were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but, P. refusing to have anything to do with them, they remained there until P.'s bankruptcy on the 19th of October, when W. claimed them:—

Held, upon a special case stated in an action of trover by P.'s assignee against the railway company, in which the Court were to draw inferences of fact, that, under the circumstances, the transitus was never determined, and consequently that the unpaid vendor, W., had a right to stop them.

THIS was an action for the alleged conversion by the defendants of goods of the plaintiff as assignee of one Thomas Parsons, a bankrupt.

Pleas, not guilty, and not possessed.

(1) 13 C. B. (N.S.) 410; 32 L. J. (C.P.) 150.
(2) See *Caswell* v. *Cook*, 12 C. B. (N.S.) 242.

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At the trial before Shee, J., at the last Liverpool assizes, a verdict was found for the plaintiff for 301*l.* 12*s.* 1*d.*, subject to the following case:—

1. On the 12th of July, 1864, Parsons bought from Joseph Wolstencroft eleven skips of 32 cop twist, at 2*s.* 9¼*d.* per lb. The goods were then lying at the defendants' railway station in Salford.

2. On the 19th of July, Wolstencroft sent an invoice to Parsons of the whole of the goods, with the numbers and weight of each skip.

3. On the 27th of July, part of the goods, viz. three skips, were delivered by Wolstencroft, at the Brierfield railway station, on the defendants' line of railway, to the order and at the request of Parsons. For some reason which did not appear, Parsons, on the 2nd of August, returned the above-mentioned invoice to Wolstencroft; and on the 4th, he wrote to Wolstencroft:—"We decline taking any more of the 32 twist, whatever the consequences may be. It is so bad we cannot get our winders and warpers to work it. If you have sent the four skips off, we shall return them."

On the same day Wolstencroft wrote to the defendants as follows:—

"27, Spring Gardens, Manchester, Aug. 4, 1864.

Order to the Lancashire and Yorkshire Railway Company, Salford station, by Joseph Wolstencroft.

Please send to Thomas Parsons, Brierfield station, four skips out of the eleven skips marked G.H.L. 583, 495, 584, 573. Please send them off to-day. In 20 arch."

4. On the 16th of August, Parsons paid Wolstencroft 95*l.* for the three skips delivered on the 22nd of July. It was admitted, that, as to the three skips, there was no objection made by Parsons, except as to the weight; and this was allowed for in the 95*l.* It was also admitted, that, at the time the three skips were ordered to be delivered to Parsons, the whole eleven skips were lying at the defendants' railway station at Salford.

5. On the 17th of August, Wolstencroft sent to Parsons an invoice of the remaining eight skips, amounting to 301*l.* 12*s.* 1*d.*; accompanying it with the following intimation:—"Four of these skips have been sent to Brierfield station according to your wish;

the other four are lying at Salford station, waiting your instructions; whatever is wrong in the weight shall be made right;" and, on the same day that Parsons received the above invoice, he returned it to Wolstencroft, inclosed in a letter, saying: "We wrote you on August 4th, by train, we should not take any more of the twist; therefore we shall not have any more of it, as we cannot get it worked. We return you the invoice." Parsons allowed the four skips to remain at the Brierfield station, and instructed his carter not to remove them.

6. On the 27th of August, Parsons received a letter from Wolstencroft's attorney, demanding payment of the price of the eight skips undelivered.

7. On the 1st of September, Wolstencroft sent the following order to the defendants:—"Please deliver to Mr. T. Parsons, Brierfield station, the remaining four skips lying in 20 arch, G.H.L. 574, 153, 938, 571, to-day."

8. On the 2nd of September, Parsons's carter, without his knowledge, took away from the Brierfield railway station the four skips last sent by Wolstencroft; but these were at once returned by Parsons; and on the same day he consigned the whole eight skips from the Brierfield station to Wolstencroft, and got from the station-master a memorandum of receipt of the goods.

9. On the same day, the whole eight skips were sent by the defendants from the Brierfield station to Salford, to the order of Wolstencroft; but he refused to receive them; and they were sent back to Brierfield: and on the 6th of September the defendants sent a letter to the following effect to their station-master at Brierfield:—"8 skips weft refused by consignee, stating returned goods. Please inform sender, and reply."

10. On the 7th September, the defendants wrote to Parsons: "You consigned eight skips to J. Wolstencroft, Manchester, on the 2nd instant. He refuses to take them, stating they are returned goods. Please say how they must be disposed of;" and on the same day Parsons wrote to the defendants, in answer:—"The eight skips you wrote about, we cannot give any information about them. The skips are not ours. We shall have nothing to do with them: they belong to J. Wolstencroft." The eight skips were sent back to the Salford station by the defendants the same night.

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11. Nothing further took place between any of the parties, in relation to the eight skips, until the 30th of September, on which day particulars of demand for 319*l.* 8*s.* 11*d.*, and a notice requiring payment, under the Bankruptcy Act, 1861, was served on Parsons by Wolstencroft. It was admitted that 301*l.* 12*s.* 1*d.* only was due on the remaining eight skips.

12. On the 3rd of October a trader-debtor summons was served upon Parsons, returnable on the 12th.

13. On the 4th of October, Wolstencroft's attorney wrote to the defendants:—"Be good enough to retain possession of the undermentioned skips, on behalf of Mr. Joseph Wolstencroft, until further instructed by me.

8 skips marked G.H.L. 583, 495, 584, 573, 153, 938, 571, 574."

The eight skips mentioned in this letter were the skips now in question.

14. It was admitted that Parsons, on the return of the trader-debtor summons, viz. on the 12th of October, 1864, appeared before the bankruptcy court, and resisted the application made by Wolstencroft, on the ground that he had a good defence on the merits: and on the same day an order was made requiring Parsons to enter into a bond with sureties to pay such sum as should be recovered in any action brought for the recovery of such demand.

15. On the 19th of October, Parsons petitioned the bankruptcy court, and on the same day was adjudicated a bankrupt.

16. On the same day, Wolstencroft wrote to the defendants: "The eight skips, G.H.L., Nos. 583, 495, 584, 573, 574, 153, 938, 571, lying in the cellar at your station, please let them continue there to my order."

17. On the 21st of October, the officer of the Court of Bankruptcy demanded the goods from the defendants, and gave them notice not to part with them, as they were claimed by the assignee under Parsons's bankruptcy; and the defendants' clerk thereupon shewed to the officer an entry in the defendants' book, stating that the same goods were claimed by Wolstencroft.

18. On the 21st of October, Wolstencroft sent the defendants an order for the delivery of the goods in question to him; and on the 29th they were delivered by the defendants to Wolstencroft.

19. The first meeting of Parsons's creditors in bankruptcy for proof of debts was held on the 1st of November, 1864, when Wolstencroft's attorney tendered a proof for 319*l.* 8*s.* 11*d.*, which being objected to on account of the discrepancy in the amount claimed by the letter of the 26th of August, 1864, and that claimed by the proof, it stood over till the next meeting, and had never since been presented, nor had Wolstencroft proved his debt.

20. On the 5th of December, the attorneys for the plaintiff wrote to the defendants as follows:—

"Gentlemen,—We have been consulted by the assignee of Parsons, a bankrupt, in reference to the following matter: It appears that eight skips 32 cop twist were consigned to the bankrupt by a person named Wolstencroft, from Manchester to Brierfield station, about the end of last August, and were returned by the bankrupt on the 2nd of September, but were refused by Wolstencroft, and at the time of the adjudication of Parsons were lying at the New Bailey Street station, Salford, to the order of the bankrupt; and that the messenger of the Court of Bankruptcy gave you notice to hold the goods, but that you have nevertheless delivered them to Wolstencroft, without communicating with the messenger. We are instructed to apply for compensation, or, in default, to bring an action."

To this the defendants' attorneys replied that they were instructed to defend any proceedings that might be commenced against the company.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover. If the Court was of opinion that the plaintiff was entitled to recover, the verdict was to stand; but, if the Court should be of a contrary opinion, a verdict was to be entered for the defendants.

Holker (*C. Crompton* with him), for the plaintiff. The case finds that the bargain between Wolstencroft and Parsons was for eleven skips which were at the time lying upon the premises of the company at Salford. All that remained for the seller to do was to deliver the goods; and three of the skips were actually delivered, and an order was sent by the seller to the defendants for the delivery of the remainder. The property in the whole, therefore,

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clearly vested in Parsons: *Morgan* v. *Gath.* (1) It will be said that the price remaining unpaid, the vendor had a right to stop the goods in transitu. But the right of an unpaid vendor to stop goods in transitu is at an end from the moment they get into the hands of the vendee or of a carrier or warehouseman for him: *Lickbarrow* v. *Mason* (2), and the notes thereto in 1 Smith's Leading Cases, 5th ed. 681; *Wentworth* v. *Outhwaite* (3); *Dodson v. Wentworth.* (4) The termination of the transit is not affected by the vendee's objection to the quality or weight. *Cusack* v. *Robinson* (5) is strongly in favour of the plaintiff, though the real question there turned upon the sufficiency of the acceptance to satisfy the requirements of the Statute of Frauds, 29 Car. 2, c. 3, s. 17. *Smith* v. *Hudson* (6) is a still stronger authority to shew that the transitus here was at an end as soon as the goods reached the Brierfield station. "The goods," says Cockburn, C.J., "had arrived at the place which, as between buyer and seller, was the place of their destination; therefore, the transitus was at an end." It is impossible to distinguish the case from those above cited. The fact of Parsons having ordered the goods (the eight skips) to be sent back, makes no difference. The seller refused to receive them; they, therefore, still remained in the defendants' hands for Parsons. To constitute a rescision of a contract, the consent of both parties is essential.

Brett, Q.C. (*J. A. Russell* with him), for the defendants. The first question is, whether the property in the eight skips passed at all. The contract was general, and might have been fulfilled by the delivery of any goods of the like description.

[WILLES, J. The contract was for the eleven skips then lying at the Salford station.]

The transitus clearly was not at an end when the goods were claimed by the seller on the bankruptcy of the purchaser. The defendants held them as carriers, and not as warehousemen. There is no pretence for saying that they were held by the defendants at the Brierfield station as the agents of Parsons. He declined to receive them, and gave the defendants notice that they were to hold them for Wolstencroft, and, before the title of the plain-

(1) 3 H. & C. 748; 34 L.J. (Ex.) 175.
(2) 2 T.R. 63; 1 H.Bl. 357; 6 East, 21.
(3) 10 M. & W. 436.
(4) 5 Scott N. R. 821.
(5) 1 B. & S. 299; 30 L. J. (Q.B.) 261.
(6) 34 L. J. (Q.B.) 145.

tiff as assignee intervened, Wolstencroft assented to that arrangement.

[ERLE, C.J. It is enough that the transitus was not at an end. I see no evidence that the agreement was rescinded.]

Holker, in reply. It can hardly be said that the eight skips were in course of being carried between the 4th of August and the 2nd of September. They must have been warehoused for somebody, and they could not have been warehoused for the vendor, for he had expressly repudiated them. Parsons alone could then be the owner of the goods.

[WILLES, J. In *James* v. *Griffin* (1), an intimation from the vendee that he did not intend to accept the goods, though they were delivered at a wharf where he had been accustomed to have goods landed for him, was held to keep alive the vendor's right of stoppage in transitu. How do you distinguish that from the present case?]

The vendee there had given no authority to the captain to land the goods at the wharf as a place of deposit on his behalf.

ERLE, C.J. I am of opinion that our judgment in this case should be for the defendants. The action is brought by the plaintiff as the assignee of one Parsons, a bankrupt, for the alleged wrongful conversion by the defendants of certain skips of cotton twist which he claims as having been the property of Parsons at the time of his bankruptcy. As far as the contract is concerned, it may be taken that Parsons was entitled to the goods; but, when he became bankrupt, they were not in his possession, but in that of the defendants; and the point which we have to decide, is, whether the vendor, upon that event taking place, had the right of an unpaid vendor to stop the goods in transitu. I do not find it stated for certain upon the case where the place of delivery was to be; but I assume it to be probable that the skips were to be delivered to Parsons's carts at the Brierfield station. The three skips which arrived there on the 22nd of July were so taken; and as to these there is no question but that the delivery was complete. As to the remaining eight skips, however, I am of opinion that they did not cease to be in transitu by being at the Brierfield station. Before they arrived there, notice had been given by Parsons to the vendor

(1) 2 M. & W. 623.

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that he declined to receive them; and after their arrival Parsons gave the defendants orders to take them back again. The vendor at first refused to have anything to do with them; and thus the goods, being rejected both by the vendor and by Parsons, remained in the hands of the defendants. Under these circumstances, it seems to me that the goods never ceased to be in transitu. It is clear from the case of *James* v. *Griffin* (1) that the intention of the vendee to take possession is a material fact. So, in *Whitehead* v. *Anderson* (2), Parke, B., says: "The question is quo animo the act is done. My notion has always been that the question is whether the consignee has taken possession, not whether the captain has *intended to deliver it.*" It is perfectly clear, that when the eight skips were at Brierfield station, Parsons had no intention to take possession of them. As to the four which were taken by the carman to his mill, they were so taken without his orders and against his will; it was just the same as if they had been carried by a wrong-doer. It was urged by Mr. Holker, that, being repudiated by both parties to the contract, the goods remained in the hands of the railway company as warehousemen for the real owner, that is, for Parsons. There is no doubt but that the carrier may and often does become a warehouseman for the consignee; but that must be by virtue of some contract or course of dealing between them, that, when arrived at their destination, the character of carrier shall cease, and that of warehouseman supervene. Here, however, there is no evidence of any such contract or course of dealing. Parsons contended throughout that the goods were so bad that he was not bound to take them. In this state of things, the unpaid vendor puts his hands upon them. I am of opinion that that is a sufficient defence to the claim set up by the assignee.

WILLES, J. I am of the same opinion. I would observe that there is one peculiarity in the facts of this case which is strongly in favour of the defendants, and which distinguishes it from *Cusack* v. *Robinson* (3), viz. that the whole of the goods were originally warehoused with the defendants as the goods of the sellers. It was not, therefore, the case of a contract for the sale of

(1) 2 M. & W. 623. (2) 9 M. & W. at p. 529.
(3) 1 B. & S. 299; 30 L. J. (Q.B.) 261.

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goods to be delivered to a carrier for the purchaser, so as to make the possession of the carrier the possession of the purchaser. The persons with whom the goods were warehoused to be kept for the seller, were the same persons as those through whose agency the goods were to be delivered to the purchaser; and the first question is, whether the agency of the defendants to keep the goods for the seller had ever ceased. Mr. Holker contends that that agency ceased when the seller intimated to the company (on the 2nd of September) that the eight skips were no longer his property; but that was coupled with a statement of the reason, "because you are to hold them for the buyer." Under some circumstances, that might possibly be construed to amount to an abandonment of the goods by the seller. But, inasmuch as these goods were of considerable value, so that it was not likely that the seller intended to throw them away, such a direction must be considered as given subject to this implied stipulation,—unless it should turn out that the vendee will not receive them. The facts might well be open to that construction; and upon that a jury ought to have been called upon to express their opinion. I am by no means satisfied that a jury would decide that question in favour of the plaintiff: but it is unnecessary to say what my opinion would be. I pass now to the main question. Mr. Holker is undoubtedly right when he says that the property in these goods passed by the contract to the vendee. Unless the property passed, there would be no need of the right of stopping in transitu. The only effect of the property passing, is, that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession unless he is prepared to pay for the goods. As long as the goods remain in the warehouse of the vendor, or in the hands of one who holds as his agent, his lien upon them for the unpaid price remains. But, when once they have got into the possession of an agent for the buyer, the vendor parts with his lien. The right to stop in transitu upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping-agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods in transitu. It must be

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observed that there is, besides the propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz. that the arrival which is to divest the vendor's right of stoppage in transitu must be such as that the buyer has taken actual or constructive possession of the goods; and that cannot be so long as he repudiates them. This is the alphabet of the doctrine of stoppage in transitu. The facts stated in this case clearly shew that the transitus was not at an end at the time Wolstencroft exercised his right to stop these goods; and that was before the bankruptcy of Parsons. Then, as to the alleged delivery of part of the goods, and the effect of that upon the vendor's right to stop the rest. There have been different expressions of opinion at various times as to whether the delivery of a portion of the goods the subject of an entire contract operates as a constructive delivery of the whole, so as to put an end to the right of stopping in transitu. It was supposed to have been thrown out by Taunton, J., that a delivery of part operated as a constructive delivery of the whole: but that doctrine has since been called in question and dissented from; and it is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole. (1) I do not think the carter's mistake in carrying away the four skips on the 2nd of September can have any effect upon the rights of the parties. When the facts are understood, the case appears to me to be a very plain one. Wolstencroft's right to stop in transitu not having been put an end to, it follows that our judgment must be in favour of the defendants.

KEATING, J. I am of the same opinion: and I can add nothing to the reasons already given by my Lord and my Brother Willes.

MONTAGUE SMITH, J. I am of the same opinion. The question is almost entirely one of fact. It is not disputed by Mr. Holker, that, if these goods were at the time of the bankruptcy of Parsons in the hands of the defendants as carriers, the right to stop them in transitu existed. When the whole facts are carefully looked

(1) See the cases collected in the notes to *Lickbarrow* v. *Mason*, 1 Smith's Leading Cases, 5th edit., 736.

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at, it is quite clear that the transitus was not at an end. The strength of Mr. Holker's argument in reply was, that the goods remained in the hands of the defendants as warehousemen for Parsons. But they could not be warehousemen for him without his consent. And the facts do not sustain the affirmative of that proposition. If Parsons had not become bankrupt, it is quite certain that he would have resisted taking possession as long as he could. The right of stoppage clearly existed.

Judgment for the defendants.

Attorney for plaintiff: *E. K. Randall.*
Attorneys for defendants: *Woodcock & Ryland.*

[In the Exchequer Chamber]

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Feb. 6.

Vendor and Purchaser—Covenant for quiet enjoyment—Measure of Damages for Breach.

The rule in *Flureau v. Thornhill*, 2 W. Bl. 1078, that, where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages *for the loss of the bargain*, does not apply to the case of a lease granted by one who has no title to grant it.

A. was in possession of premises under a lease from B., which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of 400*l.*, obtained from B. a further lease of the same premises for *twenty-one years* and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases *in possession*, and not in reversion, and consequently that the lease so granted by him to A. in February 1860, was void. A. thereupon obtained from the reversioners a fresh lease for *seven years*, at a considerable increase of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease:—

Held,—affirming the judgment of the Court of Common Pleas,—that A. was entitled to recover, besides the 400*l.* premium which he had paid to B., and the costs of preparing the void lease, the value of what he had lost by B.'s breach of contract,—substantially the difference between the value of the term professed to be granted to him by the lease of February, 1860, and that of the seven years' term which he obtained from the reversioners.

THIS was an appeal against a decision of the Court of Common Pleas.

1. The first count of the declaration alleged in substance, that,

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by an indenture dated the 14th of February, 1860, between John Furze, the testator, and the plaintiff, it was witnessed, that, for and in consideration of the sum of 400*l.* paid by the plaintiff, the said John Furze did demise and lease to the plaintiff a certain messuage and premises, No. 6, St. James's Street, from the 4th of December, 1864, at which time an existing lease would expire, for twenty-one years and twenty-one days, at a rent for the first twenty-one days of 10*l.*, and for the remainder of the term 175*l.* a year; and that the said John Furze did thereby covenant with the plaintiff, his executors, &c., that the plaintiff should peaceably and quietly have, hold, and enjoy the premises during the said term without the lawful let, suit, trouble, denial, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever claiming or to claim by, from, through, under, or in trust for him, them, or any of them. It then averred the fulfilment of all conditions, and alleged by way of breach, that, before and during the term, one Frances Vickers, then lawfully claiming the premises through the said John Furze, and having a good title to them and to the possession thereof, claimed and demanded them of the plaintiff, and threatened to oust him from the possession and enjoyment thereof; whereby the plaintiff could not and did not peaceably have, hold, and enjoy them, &c.; and by reason of the premises the plaintiff was forced and obliged to and did take and accept a lease of the said premises from the said Frances Vickers for seven years from December the 25th, 1864, at an increased rent of 360*l.* a year, and was put to great trouble and expense and costs in obtaining such lease, and had lost the benefit of the lease granted by the said John Furze, and of the 400*l.* paid for the same.

There was also a count for money received by John Furze in his life-time for the plaintiff's use.

2. The defendant pleaded, amongst other pleas, secondly, to the first count, that the plaintiff never had or entered into possession of the demised premises under or by virtue of the said lease, as alleged; fourthly, to the first count, that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment

thereof, as alleged; fifthly and sixthly, to the second count, never indebted except as to 417*l.*, and payment into court of that sum.

The plaintiff joined issue on all the pleas, and demurred to the second plea, on the ground that he was entitled to maintain the action though he should never have had possession under the lease in question.

3. The material facts, as they appeared at the trial, were as follows:—The plaintiff is a hatter, and has for many years carried on his business at No. 6, St. James's Street, Westminster, where the same business was previously carried on by his father and grandfather. The house and shop, No. 6, St. James's Street, had been demised to the plaintiff by a lease dated the 9th of February, 1838, for a term of twenty-seven years, wanting twenty-one days from December the 25th, 1837, at a rent of 140*l.* per annum. The term expired on the 4th of December, 1864.

4. Previously to the granting of the last-mentioned lease, the premises had been conveyed, and were then held, to such uses as the testator John Furze should by deed appoint, with remainder to him in fee. After the granting of the last-mentioned lease, the testator, by an indenture dated the 11th of November, 1841 (being a settlement on the occasion of the marriage of his daughter Frances Furze with James Vickers), settled and appointed the premises to trustees to the use of himself for life, with remainder to the use of his wife (who predeceased him) for life, with remainder to the use of his said daughter, who afterwards became the wife of the said James Vickers, for life, with other limitations over.

5. The settlement of the 11th of November, 1841, contained a power to the parties interested thereunder for life, as and when they should for the time being become entitled in possession, to limit or appoint the premises, in manner and on the conditions therein provided, by way of demise or lease, for any term of years absolutely not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, and without taking any fine, premium, or foregift for the making thereof.

6. The plaintiff, being desirous of obtaining a further demise

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of the premises, to commence on the expiration of his existing lease, in the early part of the year 1860 entered into negotiations for that purpose with John Furze; and on the 14th of February, 1860, John Furze, in consideration of 400*l.* paid to him by the plaintiff, executed a fresh lease of the premises to the plaintiff, at a rent of 175*l.* per annum, for a term of twenty-one years and twenty-one days from the 4th of December, 1864, at which time the then-existing lease would expire.

7. The last-mentioned lease contained a covenant by John Furze, deceased, that the plaintiff, paying the rents reserved, and performing the covenants and conditions of the lease on his part, should have quiet enjoyment of the premises during the term, without let or disturbance by John Furze, his heirs or assigns, or any person or persons lawfully claiming by, from, through, under, or in trust for him, them, or any of them.

8. At the time of the granting of the lease of the 14th of February, 1860, the plaintiff was not aware of the existence of the settlement of the 11th of November, 1841.

9. John Furze died on the 16th of May, 1863, having by his will appointed the defendant his executor; and, after his death Mr. and Mrs. Vickers, as being the persons entitled in remainder, received from the plaintiff the rent of the premises as it accrued due under the lease of 1838, until the expiration of that lease on the 4th of December, 1864. On the 4th of November, 1863, Mr. and Mrs. Vickers notified to the plaintiff that they repudiated and refused to recognise the lease of the 14th of February, 1860, and threatened to oust the plaintiff from the possession and enjoyment of the premises at the expiration of the then-existing lease: and thereupon the plaintiff entered into negotiations with Mr. and Mrs. Vickers for another lease of the premises, which resulted in a lease being granted by them, dated the 26th of December, 1864, for a term of seven years only from December 25th, 1864, at a rent of 300*l.* a year; the said Frances Vickers and her husband refusing to grant him a lease for any longer term, or at a lower rent.

10. The plaintiff, in his particulars of demand, under the second count, claimed 400*l.*, the amount of the premium paid to John Furze, for the lease granted on the 14th of February,

1860, and 17*l.* the expense of preparing it; and this 417*l.* was the sum paid into court by the defendant.

11. The plaintiff at the trial claimed under the first count 1500*l.* or 1600*l.* for damages, being the difference in value between the lease of the 14th of February, 1860, which had been avoided, and that of the new lease of the 26th of December, 1864; and it was proved that in the neighbourhood of St. James's Street, and in London generally, property had much increased in value since the year 1860, and that the rent of 300*l.* reserved by that lease was, according to the value of property in the neighbourhood at the time when that lease was granted, a reasonable rent.

12. The plaintiff further claimed under the first count a sum of 65*l.* for the costs of the new lease which was granted by Mr. and Mrs. Vickers; but this item was withdrawn from the consideration of the jury, it being agreed that the jury should find their verdict for that sum, leave being reserved to the defendant to move to reduce it as the Court might think proper.

13. With regard to the main question of damages, the Lord Chief Justice, in summing up, told the jury, in substance, that, the covenant mentioned in the first count having been broken, the plaintiff, under the circumstances, was entitled to be indemnified for what he had lost under the breach of covenant, and to recover the difference in value between the old and new leases.

14. The jury found a verdict for the plaintiff on the first count, for 1522*l.*, including the 65*l.*, and for the defendant on the second count; and leave was reserved to the defendant to move to set aside the verdict found for the plaintiff on the second and fourth pleas, and also to reduce the damages so far as they related to the sum of 65*l.*

15. In Easter Term, 1865, a rule nisi was obtained to enter the verdict for the defendant on the second and fourth pleas, pursuant to the leave reserved, on the ground that, upon the facts proved at the trial, the verdict should have been so entered; and why the damages should not be reduced to nominal damages, or to such sum as the Court might direct, on the grounds that the plaintiff was not entitled to recover more than the sum of 400*l.* which he had paid, and the 17*l.* expenses, which two sums the

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defendant had paid into court, and that he lost nothing but what he had paid; that he was not entitled to recover the 65*l.*, the costs of the second lease, or any part of it; that the plaintiff must have paid the costs of one lease, and was not entitled to throw those costs or any of them upon the defendant; and that the plaintiff was not entitled to the ten per cent. which the jury gave as upon a compulsory sale: or why there should not be a new trial, on the ground that the Chief Justice misdirected the jury in telling them that the plaintiff was entitled to recover the difference in value between the lease that was avoided and the new lease that was granted, and that the plaintiff was entitled to recover the 65*l.*, and in directing them that the plaintiff was entitled to recover the ten per cent. claimed as upon a compulsory sale. It was agreed that the demurrer to the second plea should be argued with the rule.

16. Upon the rule coming on for argument, the 65*l.*, the costs of the new lease, was by consent reduced to 25*l.*; and the rule was made absolute to enter the verdict for the defendant on the second plea, and to reduce the damages to 1348*l.*, taking into consideration the reduction of the 65*l.*, and the rule was discharged as to the residue, and judgment was given on the demurrer to the second plea for the plaintiff. (1) The defendant had leave to appeal upon the main point as to the principle of the damages.

The question for the Court was, whether the damages should be reduced, and if so, whether they should be reduced to nominal damages, or to the sum of 25*l.*

The case was argued before Pollock, C.B., Martin and Channell, BB., Blackburn and Mellor, JJ., Pigott, B., and Lush, J.

Garth (*Prentice* with him), for the defendant. The measure of damages sanctioned by the Court below was this:—The jury were instructed to take the value of the term granted by the lease of February, 1860, and to say what was the difference between the value of that term and that of the lease of December, 1864. The difference the jury found to be 1522*l.* That, it is submitted, was not the proper mode of estimating the damages the plaintiff was entitled to for the testator's breach of contract. What passed

(1) See 19 C. B. (N.S) 96; 34 L. J. (C.P.) 201.

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to the plaintiff by the lease of February, 1860, was a mere interesse termini: and the lease was repudiated by the reversioners before the plaintiff entered into possession under it. The true measure of damages was, the sum which the plaintiff had paid for that lease and the costs of preparing it: and these two sums have been paid into court. The same rule must obtain here as in the case of a vendor failing to complete a contract of purchase by reason of a defective title: *Flureau* v. *Thornhill.* (1) The authorities upon the subject in our books are very scanty: none exactly touch the point. There are many American cases, which are collected in Mayne on Damages, and in Sedgwick on Damages, which throw some light upon it. In Mayne, p. 97, it is said, that "A breach of the covenant for quiet enjoyment cannot occur till the plaintiff has actually been dispossessed or otherwise disturbed:" and, for the measure of damages reference is made to *Williams* v. *Burrell* (2), where, a lease having been declared void as against the remainder-man, on the ground that it was not in conformity with the power, the lessee was held to be entitled to recover against the executors of the lessor the value of the term, the cost of defending an ejectment brought by the remainder-man, and the mesne profits in that action, but not interest. Then arises the question whether it is to be the value at the time of conveyance or at the time of eviction. In Kent's Commentaries (3) it is said: "The measure of damages in actions on these personal covenants is regulated in some degree by the rule on the antient warranty. At common law, upon voucher, or upon the writ of warrantia chartæ, the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the feoffee was evicted. The value was computed as it existed when the warranty was made; so that, though the land had afterwards become of increased value, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things but as the land was when he made the warranty. And when personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the established measure of compensation was not varied or affected. The buyer, on the covenant of seisin,

(1) 2 W. Bl. 1078. (2) 1 C. B. 402.
(3) Vol. iv. 8th edit. p. 533.

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recovers back the consideration money and interest, and no more. The interest is to countervail the claim for mesne profits to which the grantee is liable, and is and ought to be commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This appears to be the general rule in this country." For this the learned author cites numerous American authorities.

[MARTIN, B. The only sensible rule seems to me to be that which is laid down by Parke, B., in *Robinson* v. *Harman* (1), where he says: "The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." That seems to me to be in accordance with every just law.]

The decision there proceeded upon the ground of fraud. The rule there stated may be a very reasonable one in the case of a breach of a contract for the sale of goods: but it can hardly be held reasonable that a vendor should be liable for the value of the land twenty years hence.

[BLACKBURN, J. You have to make out that the exception in *Flureau* v. *Thornhill* (2) applies where a conveyance has been executed with an express covenant for quiet enjoyment.

CHANNELL, B. This is an action upon an express contract, or a covenant. Lord St. Leonards takes that distinction pointedly in the last edition of Vendors and Purchasers, p. 236: "Where," he says, "the purchaser has paid any part of the purchase money, and the seller does not complete his engagement, *so that the contract is totally unexecuted*, the purchaser may affirm the agreement by bringing an action for the non-performance of it, or he may disaffirm it, and bring an action for money had and received to his use. In this latter action, the plaintiff cannot recover more than the money paid, although the estate has risen in value, while it should seem that, if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate

(1) 1 Ex. at p. 855; 18 L. J. (Ex.) 202. (2) 2 W. Bl. 1078.

not having been conveyed; that being the only money retained by the defendant against conscience. But where, for example, the purchasers have had possession of the property, so that the parties cannot be placed in statu quo, the count for money had and received cannot be maintained." That doctrine does not apply to the case of a covenant for title or for quiet enjoyment.]

The reason is better given in *Staats* v. *Ten Eyck's Executors* (1), cited in Sedgwick on Damages, 2nd edit. 159, and also in Kent's Commentaries, vol. iv. p. 534. In the latter, the authorities are summed up thus: "The ultimate extent of the vendor's responsibility under all or any of the usual covenants in his deed, is, the purchase money, with interest; and this I presume to be the prevalent rule throughout the United States."

[MARTIN, B. In *Hopkins* v. *Grazebrook* (2), where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him, it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. Being pressed with the decision in *Flureau* v. *Thornhill* (3), Abbott, C.J., said: "Upon the present occasion I will only say, that, if it is advanced as a general proposition, that, where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration." In the face of two cases, you want us to decide that Lord Tenterden was wrong.]

In that case the vendor knew when he offered the estate for sale that he had no title. With respect to *Williams* v. *Burrell* (4), it may be remarked that it might not have been worth the defendant's while to urge these considerations. The lessees had enjoyed the property for several years. Here, the plaintiff had a mere interesse termini. Sedgwick, at p. 157, quotes the following

(1) 3 Caines, 111.
(2) 6 B. & C. 31; 9 D. & R. 22.
(3) 2 W. Bl. 1078.
(4) 1 C. B. 402.

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case :—" In an action of covenant, it appeared that one Grylls had made a lease of the moiety of certain tithes of corn and grain to the plaintiff for years, with a covenant for title. The plaintiff was ejected by title paramount, and brought suit. On the trial, it was contended for the plaintiff that the true mode of estimating his damages was, to ascertain the value of the interest in the term, and to add to the amount thereof the costs of defending the ejectment. But it was insisted by the defendants that the plaintiff was only entitled to recover the fine paid on the making of the lease, the interest thereon to the time of judgment, and the costs of defending the ejectment: and, without deciding the point, the King's Bench intimated such to be their opinion: *Pomeroy* v. *Partington*." (1)

Mellish, Q.C. (*Archibald* with him), for the plaintiff. The covenant for title is broken the moment the deed is sealed, if the lessor has no title. But the covenant for quiet enjoyment is not broken until the enjoyment by the lessee is disturbed. It would be strange, indeed, if the damages which the plaintiff is entitled to recover in such a case are not to be estimated by what he loses at the time of the breach. Here, if the seven years' lease had not been obtained, the true measure of damages would have been the value of the lease for twenty-one years. That was for the benefit of the defendant. It is like the case of a charterer hiring another ship, where the shipowner has broken his contract to have his ship ready by a given time. The question here is, not whether the jury have done right, but whether the principle upon which the assessment of damages proceeded was correct. [He was stopped by the Court.]

MARTIN, B. The Lord Chief Baron, who has been obliged to leave the court, is clearly of opinion that the decision of the Court of Common Pleas was right; and to my mind the matter is equally clear; indeed, I believe we are all now of the same opinion. The rule is correctly laid down by Parke, B., in *Robinson* v. *Harman* (2), thus :—" The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same

(1) 3 T. R. 665. (2) 1 Ex. at p. 855; 18 L. J. (Ex.) 202.

situation with respect to damages as if the contract had been performed." That seems to me to be a rule of good sense. A man enters into a contract assuming the existence of a given state of things. If it should turn out otherwise, why should he not indemnify the other contracting party for what he has lost? It is said that the case of *Flureau* v. *Thornhill* (1) qualified that rule of the common law; but Parke, B., in *Robinson* v. *Harman* (2), treats *Flureau* v. *Thornhill* (1) as an exception; and this Court in *Sikes* v. *Wild* (3) upheld the rule there laid down, though it appears from *Hopkins* v. *Grazebrook* (4) not to have had the entire assent of Lord Tenterden. His lordship, then Abbott, C.J., there says: "If it is advanced as a general proposition, that, when a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it: if it were necessary to decide that point, I should desire to have time for consideration." It is clearly an exception; it is contrary to the rule of the common law; it had not the unqualified approval of Lord Tenterden; and I see no reason why it should be extended. (5) As to the introduction of the seven years' lease from Vickers and wife, that is in favour of the defendant. Primâ facie, according to the rule stated by Parke, B., in *Robinson* v. *Harman* (2), the plaintiff is entitled to be placed as nearly as possible in the position he would have stood in if the testator had performed his contract. But, if he has got any benefit out of the transaction, that should be taken into consideration in measuring the damages resulting from the breach of contract. I am of opinion that the judgment of the Court below was quite right.

CHANNELL, B. I also am of opinion that the judgment of the Court of Common Pleas should be affirmed; and I should have thought it unnecessary to say more, but for some doubt being entertained by one member of the Court. The existence of that doubt makes it expedient that I should shortly state the grounds upon which my opinion is founded. This is an action for the breach of a covenant for quiet enjoyment, as to which it may

(1) 2 W. Bl. 1078.
(2) 1 Ex. at p. 855; 18 L. J. (Ex.) 202.
(3) 4 B. & S. 421; 32 L. J. (Q.B.) 375.
(4) 6 B. & C. 31; 9 D. & R. 22.
(5) See the judgments in *Pounsett* v. *Fuller*, 17 C.B. 660; 25 L.J. (C.P.) 145.

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be observed that it differs in its consequences from the case of a breach of a covenant for title, inasmuch as in the latter case the breach occurs at the time of the contract, whereas in the former it occurs at the time of eviction. The question we have to deal with is, what is the principle upon which the damages in such a case are to be assessed? It appears from the 13th paragraph of the special case, that the Lord Chief Justice in his summing up told the jury, in substance, that, the covenant having been broken, the plaintiff was under the circumstances entitled to be indemnified for what he had lost by reason of that breach, and to recover the difference in value between the old and the new leases; and that his claim was not limited, as urged on the part of the defendant, to the 400*l.* which he had paid for the new lease. I take the indisputable rule of law to be, that, where a man enters into a contract, and fails to perform it, he must make compensation to the extent of the injury sustained by the person with whom he has contracted. Several cases were adverted to in the court below which have no very close application to this case. Where a contract is in fieri, and the vendee chooses to rescind the contract, and sue for money had and received, he recovers only the money he has actually paid, viz. the amount in the vendor's hands. So, again, if he elects to affirm the contract, and to sue for the breach, he is entitled only to nominal damages. The present case is perfectly distinguishable from those. The defendant is not sued in respect of a contract which is in fieri or which has been rescinded. This is a contract which the defendant's testator has executed as far as he could: he has made a conveyance which contains a covenant for quiet enjoyment for a term of years. The plaintiff was already in possession of the premises under an unexpired lease; that which was conveyed to him, therefore, was strictly speaking an interesse termini, and consequently there was no actual eviction. But that was not necessary. Here was a contract actually executed, and no longer in fieri. The testator expressly bargained for that which he could not perform; and therefore I think the proper principle upon which the damages should be assessed, is, a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him. It is true that the difference in value between the old and the new

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leases was not necessarily the amount; but what was done at the trial was merely a mode of working out the principle laid down by the Lord Chief Justice, viz. that the plaintiff was entitled to recover what he had lost by the breach of contract, and it in reality was in ease of the defendant. The taking the seven years' lease was no doubt the best thing to be done under the circumstances. The finding of the jury, as corrected by the Court in banc, ought, I think, to stand.

BLACKBURN, J. I also am of opinion that the judgment of the Court below should be affirmed. The general rule undoubtedly is as laid down by Parke, B., in *Robinson* v. *Harman* (1), that, where a contract is broken, the person injured by the breach is to be placed as far as money can do it in the same position as he would have been in if the contract had been fulfilled. Where the carrying out of the contract would give one of the contracting parties the enjoyment of a particular thing, and he has lost it, the damages he would be entitled to would be the value of that which he has lost. From that general rule so laid down by Parke, B., there is an exception, the reason for which no doubt is this, that, from the complicated nature of our law of real property, no man can be certain that he has a perfect title to his estate, and therefore it is a prudent thing to make it part of every bargain for the sale of real property, that, if the vendor fails to make a good title according to the conditions, he shall not be liable to reimburse the intended purchaser the full measure of damages which would be awarded to him in an ordinary case; but that the bargain should be off, and the purchaser take back the amount of deposit he has paid, together with interest, and the expenses of investigating the title, if any. That would be reasonable. *Flureau* v. *Thornhill* (2) and some subsequent cases have established that such a stipulation is assumed to be part of the contract, though not actually expressed. In contractis tacité insunt quæ sunt moris et consuetudinis. Lord Wensleydale puts it in that very way in *Walker* v. *Moore* (3), where he says: "A jury ought not, in the case of a vendor in possession to give any other damages, in consequence of a defect being found in the title, than those which were allowed in

(1) 1 Ex. at p. 855; 18 L. J. (Ex.) 202.
(2) 2 W. Bl. 1078.
(3) 10 B. & C. 416.

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Flureau v. *Thornhill* (1), which was recognised in *Johnson* v. *Johnson* (2), *Bratt* v. *Ellis* (3), and *Jones* v. *Dyke.* (4) In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way; and that excludes the claim of damages on account of the supposed goodness of the bargain." That is the true and the only principle upon which *Flureau* v. *Thornhill* (1) can be supported, viz. that the parties have tacitly agreed that this should be understood as a term of the bargain between them. And there is no hardship in this: it is only saving the trouble of writing at full length that which is understood as one of the terms of the contract. This, however, is not the case of a contract for the sale of land; but the case of a conveyance by which the lessor conveys out and out the thing intended to be conveyed: and the conveyance contains a covenant for quiet enjoyment by the lessee, which covenant has been broken. Why should the lessee, who has lost a valuable lease, have a less measure of damages than he would have been entitled to if by the testator's breach of contract he had lost a ship of a given value? *Flureau* v. *Thornhill* (1) does not apply to the case of an executed contract. There is no case (except that of *Pomeroy* v. *Partington* (5), cited in Sedgwick on Damages, 157) where that has ever been suggested. The American cases are infinitely various. Some of the States seem to adopt the common law of England. It may be that there is such a well-established custom in New York and some of the other States of America as is stated by Mr. Sedgwick. But we must be governed by our own law: and the only decision upon the point now before us is in the case of *Williams* v. *Burrell.* (6) There the point was given up by Sir T. Wilde, who considered it too clear for argument. Upon the whole, I am of opinion that the true measure of damages for the breach of a contract such as this, is, what has the plaintiff lost by the breach of the contract? and that there is no difference in this respect between a contract for the sale of real property and a contract for a chattel.

(1) 2 W. Bl. 1078.
(2) 3 B. & P. 162.
(3) Sugd. V. & P. 14th ed. App. 5.
(4) Sugd. V. & P. 14th ed. App. 6.
(5) 3 T. R. 665.
(6) 1 C. B. 402.

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MELLOR, J. I am of the same opinion. The testator professed to grant the plaintiff a lease for twenty-one years, with a covenant for quiet enjoyment. It turns out that the lessor had no title to grant for twenty-one years, having only an estate for life. He died, and his successor avoided the lease, and made a new bargain with the lessee for a shorter lease upon higher terms. In an action for the breach of the covenant for quiet enjoyment, the jury were told that the plaintiff was entitled to recover as damages for that breach of covenant the difference in value between the old and the new leases. I entertained some doubt as to whether that was the true measure. But, upon consideration, I think we must assume that the taking the shorter lease was the best thing that could be done under the circumstances, and was in reality for the ease and benefit of the defendant. The way in which it was put to the jury was rather the mode of working it out than declaring the rule. Upon the whole, therefore, I think there was nothing erroneous in the way in which it was left to the jury, and that the judgment should be affirmed.

PIGOTT, B. I have arrived at the same conclusion as the rest of the Court, though not without some considerable hesitation, because I have doubted whether the proper rule had been laid down to guide the jury in measuring the damages. The Chief Justice told the jury that, the covenant having been broken, the plaintiff was entitled to be indemnified for what he had lost thereby. That was quite correct: but he went on to say that the plaintiff was entitled to recover "the difference in value between the old and new leases." It certainly did strike me that there was a fallacy in arriving at the damages in that way. It occurred to me that the case differed from the ordinary case of a breach of a contract for the sale of goods, where, if the seller fails to deliver, the buyer may go into the market and buy other goods. I rather thought it was like the case of a covenant for title, and that the plaintiff should be prepared to shew what he had lost in money. He had been induced to suppose he had a valid lease for twenty-one years. It turns out that the lessor had no power to grant it. It does not occur to me how the imaginary lease can be taken as the basis for estimating the plaintiff's loss. In the result, however, I have come to the conclusion that the case is not

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to be distinguished from that of any other ordinary breach of contract.

Judgment affirmed.

Attorney for plaintiff: *A. Jones.*
Attorneys for defendant: *Combe & Wainwright.*

Feb. 10.

CORNER AND ANOTHER *v.* SWEET.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134) *s.* 192—*Deed of Inspectorship—General averment that Deed in accordance with the Statute—Release.*

In pleading a release under the Bankruptcy Act, 1861, it is enough to set out so much of the deed as shews that it is a deed in accordance with the provisions of the statute, and that it is pleadable in bar as a release.

Plea, that a deed was made and entered into between the debtor of the first part, three inspectors of the second part, and the creditors of the third part; that the deed related to the debts of the debtor, and his release therefrom, and the distribution of his estate, and was in all respects an inspectorship deed within the intent, meaning, and provisions of the Bankruptcy Act, 1861; that by the deed it was provided that if and when a composition of 10*s.* in the pound should have been paid to the creditors, or if and when (though the composition might not have been paid) the inspectors should certify that the estate had been fully administered, or that the assignment contemplated by the deed had been executed, the debtor should be absolutely released, &c.; and that, inasmuch as it was essential to the interests of the creditors that the debtor should not be harassed, it was declared and agreed, that, if any creditor should, whilst the deed was in force, commence or prosecute any action in respect of his debt, the deed and the provisions therein contained should operate and have the same force as an order of discharge under the Bankruptcy Act, 1861, and might be pleaded in bar as a defence or answer to such action: the plea then averred that the requisite number of creditors had assented to the deed, and that all necessary steps had been taken, &c., to make it binding on all the creditors, and that it was still in force:—

Held, that it must be assumed that the deed was a valid deed under the statute, and that it was pleadable in bar as a release.

To a declaration for work and materials, money paid, &c., the defendant pleaded, that, before the commencement of the action, and after the 11th of October, 1861, he being a debtor within the true intent and meaning of the Bankruptcy Act, 1861, indebted to divers persons, a deed bearing date the 6th of October, 1864, was made and entered into between the defendant of the first part,

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E. De Pass, G. Sichel, and G. Hutchinson (thereinafter called the inspectors), of the second part, and the several persons, companies, and co-partnership firms, who at the date of the said deed were respectively creditors of the defendant, or who would be entitled to prove under an adjudication in bankruptcy against the defendant on a petition filed on the day of the date of the said deed (thereinafter called the creditors), of the third part, and the said deed related to the debts and liabilities of the defendant and his release therefrom, and the distribution, inspection, management, and winding up of his estate, and was in all respects an inspectorship deed within the true intent, meaning, and provisions of the Bankruptcy Act, 1861; and by the said deed it was provided and declared, that, if and when the composition or sum of 10*s.* in the pound upon their respective debts should have been paid to the said creditors respectively, or if and when (though the said sum might not have been paid) the said inspectors or inspector should certify by writing under their or his hands, to be indorsed upon or refer to the said deed, that the estate of the said debtor had been fully administered according to the provisions thereof to the satisfaction of the said inspectors or inspector, or if and when the said inspectors or inspector should in like manner certify that the said debtor had made such conveyance, assurance, or assignment as in the 21st clause of the said deed mentioned,—which certificate the said inspectors or inspector shall be bound to give immediately upon such conveyance, assurance, or assignment as aforesaid being made,—then and immediately upon such composition being paid, or (as the case might be) upon either of the said certificates as aforesaid being given, the debtor, his heirs, &c., estate, and effects, should be absolutely released and discharged from the respective claims and demands of the said creditors respectively, and the said deed should and might accordingly thereupon operate and be pleadable as a release and discharge to the debtor, his heirs, &c., as fully and effectually and in like manner as an order of discharge under an adjudication of bankruptcy: that it was further provided and declared, that whereas it was intended that the deed and the provisions thereby made should be taken and accepted by the creditors in lieu of and in substitution for their several and respective debts, claims, or

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demands in respect whereof dividends would become payable under the deed, or in respect whereof a proof could be made under an adjudication of bankruptcy against the said debtor founded on a petition for adjudication filed on the day of the date of the deed; and whereas it was essential to the interests of the creditors, and for the better realization of the estate, that the debtor should not be harassed by any proceedings thereafter to be commenced or prosecuted by any of the creditors in respect of any such debt, claim, or demand as aforesaid, it was by the said deed declared and agreed, that, if any of the creditors should at any time thereafter whilst the said deed was in force commence or prosecute any action, suit, or other proceeding in respect of any such debt, claim, or demand as aforesaid, the said deed and the provisions therein contained should operate and have the same force and effect as an order of discharge which had taken effect under the Bankruptcy Act, 1861, and the said declaration and agreement might be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used in case the debtor had been adjudicated a bankrupt in respect of any of the said debts, claims, or demands of the said creditors or any or either of them, and had obtained his order of discharge: Averment, that a majority in number representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, did in writing assent to or approve of the deed; that it was duly executed by the debtor and by the inspectors, and duly filed; that all conditions, &c., had happened, &c., to make the deed as valid and binding on all the creditors as if they had been parties to and duly executed the same; that the plaintiffs were creditors, and the claim a debt, claim, and demand within the deed, and in respect of which a dividend would become payable under the same; that the deed was still in force; and that, by reason of the premises, the defendant was entitled to plead it in bar of and as a defence to the action.

Demurrer, the grounds alleged being that "it does not appear that the deed pleaded was signed by or on behalf of three fourths in number and value of all the creditors, or that the deed

was made for the benefit of all the creditors of the defendant; and that the deed is void, inasmuch as it contains a stipulation that it may be pleaded in bar to any suit by a creditor not a party to it, before the release takes effect." Joinder.

Woollett, in support of the demurrer. The deed in this case differs materially from that which was held good by the Exchequer Chamber in *Wood* v. *De Mattos*. (1) This deed is to operate as a release in one of three events—when the composition of 10*s*. in the pound shall have been paid to each creditor, or when the inspectors shall certify that the estate has been fully administered to their satisfaction, or when they shall certify that the debtor has made a certain assignment. No time is fixed for the performance of any of these things. To make the deed a valid deed within the 192nd section of the Bankruptcy Act, 1861, its provisions must be reasonable: *Hidson* v. *Barclay*. (2)

[WILLES, J. The whole deed is not before the Court.]

Enough of it is set out in the plea to shew that the deed is an unreasonable one: and the general averment that all conditions have been performed, and all things been done to make the deed valid and binding on all the creditors, will not cure it. The release in the first part of the deed is conditional: to operate as a bar, it must be absolute.

[WILLES, J. The general averment that the deed was in all respects an inspectorship deed within the true intent and meaning and provisions of the Bankruptcy Act, 1861, would compel the defendant to produce a deed which is in all respects a compliance with the act. The plea, however, goes on to state, that, besides being a deed within the statute, it was a deed whereby it was provided, that, if a composition of 10*s*. should be paid to the creditors, or certain certificates should be given by the inspectors, the defendant should be absolutely released and discharged from his debts, and the deed should operate and be pleadable as a release. Assume that that is objectionable: it may be rejected. What you have to deal with is the subsequent clause, which provides, that, if any creditor shall sue the debtor, the deed shall

(1) Law Rep. 1 Ex. 91.
(2) 3 H. & C. 9; 33 L. J. (Ex.) 273: in error, 3 H. & C. 361; 34 L. J. (Ex.) 217.

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operate and have the same force and effect as an order of discharge in bankruptcy, and may be pleaded in bar as a defence or answer to such action. That is in accordance with *Gibbons* v. *Vouillon* (1), and is allowed by the statute, as we have held in several cases. A covenant not to sue is no answer; but a covenant that the debtor may plead the deed as a release is. It was upon this principle that we held a deed following the form given by s. 200 not to be a bar: *Eyre* v. *Archer*. (2) In *Tabor* v. *Edwards* (3), there was a general averment as here, but no release clause was set out in the plea; and I appear to have distinguished the case of *Bloomer* v. *Darke* (4) on the ground that, though the general averment that a thing is contrary to the form of a statute is bad, the general averment that it is in accordance with the provisions of a statute is good: and the Court, in giving judgment, seemed to think the latter would be sufficient, though no decision was pronounced upon it, because they held the plea bad for want of an averment that the deed was to operate as a release. In the course of the argument I observed, that, "if the plea had gone on to say, 'and whereby it was agreed that the defendant should be released and discharged from all his debts,' &c., the difficulty suggested could not have arisen." One member of the Court, therefore, thought that, if the specific averment of a release had been added, the plea would have been good. That averment is contained in this plea.]

It is not an absolute release, but a release in futuro—when the composition shall have been paid.

[WILLES, J. *Gibbons* v. *Vouillon* (1) shews that you may have a prospective release.]

There the release was to take effect at a specific period; here it may never take effect at all. It is most unreasonable that the debtor should have this privilege, unless there is some corresponding advantage to the creditors. No time is fixed for payment of the dividend, or for the certificate that the estate has been administered or the assignment made.

[WILLES, J. The law would infer that this was to be done

(1) 8 C. B. 483; 19 L. J. (C.P.) 74.
(2) 16 C. B. (N.S.) 638; 33 L. J. (C.P.) 296.
(3) 4 C.B. (N.S.) 1; 27 L.J. (C.P.) 183.
(4) 2 C. B. (N.S.) 165; 26 L. J. (C.P.) 214.

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within a reasonable time. In *Clapham* v. *Atkinson* (1), a deed which provided for the payment of a composition of 2*s.* 6*d.* in the pound *twelve months* after the date of the deed, was held to fulfil the conditions required by s. 192 of the Bankruptcy Act, 1861.]

There is no provision at all here for the time of payment of the 10*s.* in the pound: in *Clapham* v. *Atkinson* (1) a time was fixed, though a remote one. Neither is there any provision here for a tender of the dividend to the non-assenting creditors.

[WILLES, J. We have no means of knowing that there is not.]

None appears upon the face of the plea.

Lanyon (*J. Brown, Q.C.*, with him) was not called upon. (2)

WILLES, J. I am of opinion that our judgment must be for the defendant. The only question which has raised any doubt in my mind is in reference to the way in which the deed is pleaded. The doubt, indeed, is not my own, but is derived from recollections of the old rules of law when special demurrers were in fashion, viz. whether it was necessary to set out the whole of the deed in the plea, or whether it was sufficient to set out so much of it only as to shew that it was a deed which afforded a good defence within the statute. A distinction was made in those days between the averment that the act was done contrà formam statuti or secundum formam statuti: in the former case, the general averment was held not to be a sufficient averment of an offence committed, unless facts were stated which shewed a breach of the statute; whereas, in the latter case, the general averment that the act was done according to the form of the statute, was (with certain exceptions) always held to be sufficient, and under it,—it being an averment of fact,—a compliance with the statute might be proved, and it was not open to special demurrer. One instance was that of an assignment of a sheriff's bond, where it was held sufficient to allege that the assignment was according to the form of the statute in such case made and provided. So soon as special demurrers were abolished, it followed that you might in all cases where a general

(1) 4 B. & S. 722; 34 L. J. (Q.B.) 49.

(2) See *Ray* v. *Jones*, 19 C. B. (N.S.) 416; 34 L. J. (C.P.) 306: *Walker* v. *Nevill*, 3 H. & C. 403; 34 L. J. (Ex.) 73: *Bond* v. *Weston*, Law Rep. 1 Q. B. 169: *Buvelot* v. *Mills*, Law Rep. 1 Q. B. 104: *Hazelgrove* v. *House*, Law Rep. 1 Q. B. 101.

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description of the deed was given make the pleading good by averring generally that it was according to the form of the statute. Where the deed is insufficiently described, the only way of objecting now is, if the plea is embarrassing, by applying to a judge at chambers to amend it. But it is clear that that course could not be taken here, because the plaintiff might have got rid of the difficulty by setting out the deed at length in his replication,—a course which has been pursued in many cases. For these reasons, I think there is abundant authority for holding that this is an averment of fact and not of law; and, this being so, it is much more convenient to hold the averment as it stands to be valid, than that it is necessary to set out the whole deed in the plea. I have, therefore, no hesitation in saying that upon these pleadings it must be taken that the deed is a good deed under the statute. Then, does the subsequent part of the plea afford any defence to the action? I am of opinion that it does. Passing by the first provision for a release, we come to the second, which seems to me to answer the objections which have been urged against the plea. It recites that "whereas it was essential to the interests of the creditors, and for the better realization of the estate, that the debtor should not be harassed by any proceedings thereafter to be commenced or prosecuted by any of the said creditors, in respect of any such debt, claim, or demand as aforesaid," and then proceeds, "it was by the said deed declared and agreed that if any of the said creditors should at any time thereafter whilst the said deed was in force commence or prosecute any action, suit, or other proceeding, in respect of any such debt, claim, or demand, as aforesaid, the said deed and the provisions therein contained should operate and have the same force and effect as an order of discharge which had taken effect under the Bankruptcy Act, 1861, and the said declaration and agreement might be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used, in case the debtor had been adjudicated a bankrupt in respect of any of the said debts, claims, or demands of the said creditors or any or either of them, and had obtained his order of discharge." Before

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the case of *Gibbons* v. *Vouillon* (1) there would doubtless have been considerable difficulty in dealing with the points urged by Mr. Woollett; but that case expressly decides that where a deed of arrangement gives the debtor a letter of licence for a limited period, and provides that if any action or proceeding be commenced or prosecuted against him in the interim the deed shall be pleadable as a release, it may be pleaded in bar of any action brought by a creditor who was a party to the deed. The effect of the statute is, that any deed of arrangement or inspection which before would have been valid if signed by all the creditors, is valid and binding now if assented to by three fourths in number and value of the creditors, whether signed or assented to by the rest or not. *Gibbons* v. *Vouillon* (1), therefore, is an express authority that the release here does furnish an answer to this action. In *Tabor* v. *Edwards* (2), to which I referred in the course of the argument, the plea was very similar to this, but with the omission of a very essential part, viz. the allegation that the deed contained a release. I was a party to that decision; and I am of opinion, that, if the plea had contained such an averment, it would have been held a good plea.

KEATING, J. I am of the same opinion, and I do not think it necessary to add anything.

Judgment for the defendant.

Attorneys for plaintiff: *Ley & Brocklesby.*
Attorneys for defendant: *Linklaters, Hackwood, & Addison.*

PHILLIPS AND ANOTHER *v.* IM THURN.

May 1.

Bill of Exchange—Acceptance for Honour—Forgery—Estoppel.

A bill purporting to be drawn by A. at Lima, upon B. at Liverpool, payable to the order of C., and indorsed by C. to D., and by D. in blank, was presented for acceptance to B., by a person who represented himself to be D. B., having stopped payment, refused to accept, but gave the person who presented it a letter to the plaintiffs, discount-brokers in London, with an intimation that the defendant, the London correspondent of A., would probably accept the bill for A.'s honour.

(1) 8 C. B. 483; 19 L. J. (C.P.) 74.
(2) 4 C. B. (N.S.) 1; 27 L. J. (C.P.) 183.

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The plaintiffs took the bill and B.'s letter to the defendant, and he, assuming the bill to be genuine, accepted it for the honour of the supposed drawer, and the plaintiffs thereupon discounted it. The drawing and indorsements turned out to be forgeries. In an action by the plaintiffs to recover the amount of the bill from the defendant:—

Held, that the defendant, having induced the plaintiffs to part with the money upon the faith of his authentication of the bill, was estopped from denying its genuineness; and, *semble*, that, the payee being a fictitious or non-existing person, the bill was to be taken to be a bill payable to bearer.

THIS was an action brought by the plaintiffs as indorsees against the defendant as the acceptor for honour of the bill of exchange hereinafter mentioned. The following case was stated for the opinion of the Court, without pleadings:

1. The plaintiffs are discount-brokers in London. The defendant is a merchant in London, and is the correspondent and agent there for a firm carrying on business at Lima, under the name of Canevaro & Co.

2. In June, 1864, a person calling himself Enrique or Henry Plana, presented to one Sultzberger, at Liverpool, for acceptance, a bill of exchange, in the Spanish language, of which the following is a translation:—

"No. 771. Lima, 12 May, 1864.

For 400*l.* 0*s.* 0*d.*

At sixty days sight please pay by this first of exchange (second and third not being paid) to the order of Mr. Carlos Raffo, the sum of Four hundred pounds stirling, value received, which place to account according to advice of

Canevaro & Co.

To Mr. H. H. Sultzberger, Liverpool."

3. At the time the bill was so presented to Sultzberger, it bore the following indorsements:—"Pay to the order of Mr. Enrique Plana, Lima, 12 May, 1864. Carlos Raffo. Henry Plana."

4. The bill was a forgery on Canevaro & Co., and it was to be taken that no persons named Carlos Raffo or Enrique (or Henry) Plana were known at Lima or to Messrs. Canevaro & Co. A clerk of Canevaro & Co., named Arnaboldi, absconded from Lima, by the mail-packet which left for England on the night of the 13th of May, 1864. A person named Jose Moretti, who was not in the employment of Canevaro & Co., left Lima with Arnaboldi. It was to be taken for the purposes of this case that Arnaboldi assumed

the name of Plana, and that he was the person mentioned in paragraph 2 of the case.

5. The written parts of the bill were undoubtedly in the handwriting of Arnaboldi, and it was to be taken that the indorsement "Henry Plana," was written by him. It did not appear by whom the other indorsement mentioned in paragraph 3 was made, but it was to be assumed for the purposes of this case to have been made by Arnaboldi or Jose Moretti. These facts, however, were not known to Sultzberger at the time the bill was presented to him for acceptance; nor were they known to the defendant at the time when he accepted the bill as hereinafter mentioned, or to the plaintiffs.

6. Sultzberger, having stopped payment, declined to accept the bill, but wrote to the plaintiffs, with whom he was in the habit of dealing, the following letter:—

"Liverpool, 21st June, 1864.

Messrs. B. S. & J. Phillips & Co.

Dear Sirs,—I have this day given your address to Mr. Henry Plana, the holder of two drafts on myself for 400*l.* and 800*l.*, which I was prevented from accepting in consequence of having lately been under the painful necessity to suspend my payments. Messrs. J. C. im Thurn & Co. will intervene and accept on behalf of the drawers, Messrs. Canevaro & Co., Lima (who themselves are safe for any amount); and, as Mr. Plana is quite a stranger here, and might have some difficulty to get the bills discounted, I wished to render him some service. I therefore gave him your address, thinking that with Messrs. im Thurn's signature you will not object to discount the bills for him.

H. H. Sultzberger.

P.S. Mr. Plana tells me he intends making some purchases, and would be glad to get the notes, if possible, by return of mail."

The bill for 400*l.* mentioned in this letter is the bill mentioned above in paragraph 2 of the case.

7. This letter was accompanied by the following letter from the person calling himself Plana, to the plaintiffs, inclosing the bills referred to:—

"Liverpool, 21st June, 1864.

Messrs. B. S. & J. Phillips & Co.

Gentlemen,—I am indebted for your address to Mr. H.

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Sultzberger, of this town; in consequence of which I take the liberty of inclosing you two drafts of Messrs. Canevaro & Co. at Lima, for 400*l.*, sixty days sight, and 800*l.*, ninety days sight, on the said Mr. Sultzberger, who tells me that certain reasons prevent him from accepting them, but that Messrs. J. C. im Thurn & Co., London, will accept on behalf of the drawers. I now request you to get these two drafts presented for that purpose to Messrs. J. C. im Thurn & Co., and afterwards to get them discounted for my account as favourably as possible, and remit me the balance in notes per registered letter to the address at foot. In the event of your not feeling disposed to discount the bills, I request you to return them to me, provided with the needful, excusing the trouble.

Henry Plana."

8. Upon receipt of these letters, the plaintiffs shewed them, with the bills and the indorsements on them, to the defendant, and inquired whether he would accept for honour of Messrs. Canevaro & Co.: and the defendant stated that he would.

9. The plaintiffs afterwards informed Sultzberger and the person calling himself Plana, that they would discount the bills upon their being accepted by the defendant.

10. The bills were thereupon duly protested for non-acceptance, and were then presented to the defendant, and were left in his office for acceptance for twenty-four hours, in the ordinary course of business; and he accepted the same in the following form:—

"Accepted for honour and on account of Messrs. Canevaro & Co., with charges 4*s.* London, 24 June. J. C. im Thurn & Co."

11. The plaintiffs thereupon discounted the bills, upon the faith of the acceptance of the defendant, and remitted the proceeds as directed in the letter set out in paragraph 7.

12. Shortly after the plaintiffs had discounted the bills, the defendant received information of the facts stated in paragraphs 3 and 4, and informed the plaintiffs thereof; and, upon the bills being presented to the defendant at maturity, he refused to pay the same.

13. The Court was to be at liberty to draw any inference from the above facts which a jury might draw.

The question for the opinion of the Court was, whether, on the above-stated circumstances, the plaintiffs were entitled to recover the amount of the bill from the defendant. If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for 400*l.* and interest, with costs. If in the negative, judgment was to be entered for the defendant, with costs.

Hannen, for the plaintiffs. When this case was before the Court on demurrer, the plea (which alleged that the payee was a fictitious person) was held bad on the ground that the defendant, by accepting for the honour of the drawer, put himself in the position of the drawer, and was estopped from setting up what the drawer would himself be estopped from setting up. (1) That is the good sense of the thing; and is decisive of this case. By accepting the bill the defendant vouches the handwriting of the drawer, his correspondent. What were the liabilities of Canevaro & Co.? One who draws a bill payable to a fictitious payee, is estopped from saying that he is not a real person, and from denying his capacity to indorse. In Byles on Bills (2), it is said: "By acceptance, the drawee admits the signature and capacity of the drawer, and cannot, after thus giving the bill currency, be admitted to prove that the drawer's signature was forged. He moreover admits, and so does the maker of a promissory note, the then capacity of the payee to whose order the bill or note is made payable to indorse." * * * "But, where the bill is drawn in a *fictitious name,* the acceptor undertakes to pay to an indorsement by the same hand." For this the learned author refers to *Cooper* v. *Meyer* (3), where Lord Tenterden says: "It is clear that these acceptances were given on Darby's credit, and indeed the jury found that he drew and indorsed the bills. The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it. But it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so; but, if there is in reality no such person, I think the fair construction of the implied undertaking is, that he will pay to the signature of the same person that

(1) 18 C. B. (N.S.) 694. (2) 8th edit. 184. (3) 10 B. & C. 468.

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signed for the drawer;" and Bayley, J., expressed himself in similar terms. The plaintiff is entitled therefore to assume that this is an action against Canevaro & Co. The judgment in *Gibson* v. *Minet* (1), in the House of Lords, sustains the same proposition. As against the person who sends it forth, the bill becomes a bill payable to bearer. The indorsements were on the bill at the time of presentment for acceptance, and the correspondence was before the defendant; surely, as against him, that operates as an estoppel.

[KEATING, J. The case expressly states that the plaintiffs took the bill on the faith of the acceptance of the defendant.]

In *Ashpitel* v. *Bryan* (2), the plaintiff, as executor of B., declared upon a bill of exchange purporting to be drawn by A. and accepted by the defendant, and indorsed by A. to B. The defendant pleaded that A. did not indorse the bill. It appeared that A., who was possessed of goods, being the stock in trade upon his premises, died intestate and indebted to the defendant and other persons; and it was arranged between B. and the defendants, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and indorsed by A. The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and indorsed to the plaintiff by procuration in the name of A., and accepted by the defendant. It was held that the defendant could not be allowed to set up as a defence to the action that the bill was not indorsed by A. Wightman, J., in giving judgment, after referring to the definition of estoppel as given in Les Termes de la Ley, tit. Estoppel, and adverting to the distinction between estoppel by matter of record or deed and by matter in pais, says: "There are also cases which shew, that, after a person has by his own act warranted that what appears on the face of a bill is perfectly regular, and has received value for it (because my judgment in the present case is founded on the assumption that the defendant did receive value for his acceptance of the bill, which the jury have in effect found), after he has agreed with the person from whom he received value, and who is the holder of the bill,

(1) 1 H. Bl. 569.
(2) 3 B. & S. 474; 32 L. J. (Q.B.) 91.

that the bill should be drawn and indorsed in the names which appear on it, he is not permitted to shew that those names are false or fictitious, and to set up what would be a fraud upon the party who has given value for the acceptance."

[BYLES, J. The acceptor here did not know that Carlos Raffo and Enrique Plana were fictitious persons. Nor did Canevaro & Co.]

Canevaro & Co. must be assumed to have known that the payee and indorser were fictitious persons. The defendant has warranted this to be a genuine bill drawn by Canevaro & Co., and, as against him, the plaintiffs' rights are the same as if Raffo and Plana had been real persons.

J. A. Russell (*Mellish, Q.C.*, with him), for the defendant. The result of the facts stated in the special case is this, that, though by his acceptance the defendant may vouch for Canevaro & Co., he is induced by the representations of Sultzberger and the plaintiffs to assume that the bill is a genuine bill as regards Raffo and Plana. It is said that the acceptor for honour stands in the place of the drawer, with all his liabilities and all his rights. We may assume that to be settled by the former decision of this Court. (1) But Canevaro & Co. might have defended themselves against any claim on this bill, on the ground that it was not drawn by them: and, if they could deny their signature, why cannot the acceptor for their honour? There is no authority for the contrary proposition. The acceptor for honour ordinarily has a remedy over against the drawer: here the defendant would have none against Canevaro & Co. To entitle them to succeed, the plaintiffs must shew that this is a bill payable to bearer. And with this view *Gibson* v. *Minet* (2) is referred to. But *Gibson* v. *Minet* does not bear out the proposition, as applied to this case. The ground of the decision there was, as is well put in the opinion of Gould, J. (3), that the facts were known to all the parties, and it must have been their intention to make the bill payable to bearer. To the same effect are the observations made by Willes, J., when that case was cited in *Ashpitel* v. *Bryan* (4), in the Exchequer Chamber. Here, when the bill was

(1) 18 C. B. (N.S.) 694.
(2) 1 H. Bl. 569.
(3) 1 H. Bl., at p. 597.
(4) 5 B. & S. 723; 33 L. J. (Q.B.) 328.

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drawn, Canevaro & Co. knew nothing about it: and, when the defendant accepted it, he knew less of the facts than the plaintiffs did.

[KEATING, J. He knew that the plaintiffs were about to part with their money on the faith of his affirmance of the genuineness of the bill.]

If he knew or had the means of knowing that the signature of Canevaro & Co. was a forgery, still the defendant is not estopped from denying the indorsements: *Beeman* v. *Duck.* (1) In that case, Parke, B., says: "On the part of the defendant it is insisted that the case of *Cooper* v. *Meyer* (2) is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that, in such a case, the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties,—a doctrine which is clearly established as to bills wherein the signature is not forged: *Robinson* v. *Yarrow.* (3) In analogy to that case, the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw & Williams, by themselves, *or* some agent authorized to draw in their name: but it does not admit that it was indorsed by themselves or some agent authorized to *indorse,* which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery: but, if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of *Cooper* v. *Meyer.*" (2) That, it is submitted, is the true principle upon which this case should be decided. The cases as to estoppel by acts and representations go only to this length,—either, as in *Pickard* v. *Sears* (4), the party has made a representation as to some fact; or, as in *Ashpitel* v. *Bryan* (5), he and the other party have mutually agreed to assume a given state of facts to be true, though they knew them to be otherwise. The present

(1) 11 M. & W. 251.
(2) 10 B. & C. 468.
(3) 7 Taunt. 455; 1 B. Moo. 150.
(4) 6 Ad. & E. 469.
(5) 3 B. & S. 474; 32 L. J. (Q.B.) 91.

case does not fall within either of those: it is a case of mutual mistake.

Hannen, in reply. If Sultzberger had accepted the bill on presentation to him, he clearly could not have denied the signature of the drawers: neither can the acceptor for honour. Nor can he deny the indorsements which were on the bill at the time he accepted. There is nothing to take this out of the principle of *Pickard* v. *Sears*. (1) That doctrine is well illustrated by Crompton, J., in *Ashpitel* v. *Bryan* (2): "When two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it; and, in this class of estoppels, deceit, in which is involved the question whether the party knew the real state of facts, is not necessary."

ERLE, C. J. I am of opinion that our judgment must be for the plaintiffs. If need had been, I should have been inclined to decide the case on the ground that, upon the result of the facts, this must be dealt with as a bill payable to bearer. The acceptor for the honour of Canevaro & Co. was not at liberty to deny that the bill was drawn by Canevaro & Co.: and we have already held, when the case was before us on demurrer (3), that the defendant must be taken to have had all the knowledge that Canevaro & Co. would be assumed to have if they had really been the drawers of the bill. It follows, therefore, that this is to be treated as a bill payable to bearer. But I think there is a second ground upon which our judgment for the plaintiffs may beyond all dispute be rested, and it is this: A bill purporting to be drawn by Canevaro & Co. upon Sultzberger, was, together with two letters containing an intimation that the drawee was not in a condition to accept it, shewn by the plaintiffs to the defendant, and the latter was asked if he would accept for the honour of the drawers, which he consented to do; and the plaintiffs upon the faith of that acceptance discounted the bill. It is clear, therefore, that the plaintiffs were induced by the defendant to advance their money upon the faith of his representation that the bill was a negotiable instrument

(1) 6 Ad & E. 469. (2) 3 B. & S. at p. 492.
(3) 18 C. B. (N.S.) 694.

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properly drawn and indorsed. Upon that ground I am very clear that the plaintiffs are entitled to judgment.

BYLES, J. I am of the same opinion. If the defendant had said to the plaintiffs, "All the names upon this bill are genuine signatures," he clearly could never have disputed the fact. The facts and the letters set out in the case amount to such a representation. Further, I agree with my Lord, if it were necessary to consider what the bill really is, that, as there was no such person existing as Carlos Raffo, it must be treated as a bill payable to bearer.

KEATING, J. I am of the same opinion. I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs which enabled the person representing Plana to obtain money from the plaintiffs on the bill. Not only, therefore, is this a clear case of estoppel within the rule in *Pickard* v. *Sears* (1), but the facts bring it within the rule, that, where one of two innocent persons is to suffer from the fraud of a third, he who has enabled such third person to commit the fraud must bear the loss. Here, the defendant has enabled Arnaboldi to obtain a sum of money from the plaintiffs by a representation which was false, and he therefore is the person who should bear the consequences of the fraud. I entirely agree also with my Lord and my Brother Byles upon the other point, upon which I do not consider it necessary to add anything.

MONTAGUE SMITH, J. I am of the same opinion. I am disposed to agree that the plaintiffs are entitled to judgment on the ground that the defendant is, under the circumstances, estopped from disputing the genuineness of the bill, and the indorsements which were upon it, when he by his acceptance induced the plaintiffs to part with their money. I am also disposed to think that the bill, in order to give effect to it, may be taken to be a bill payable to bearer. The defendant, by his acceptance for honour, admits that the drawers had put their names to that which was to take

(1) 6 Ad. & E. 469.

effect as a negotiable instrument. If, therefore, Carlos Raffo was a fictitious person, Canevaro & Co. must be taken to have drawn a bill payable to bearer; and the defendant must be taken to have affirmed that they have done so.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Travers, Smith, & De Gex.*
Attorney for defendant: *J. W. Nicholson.*

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May 3.

*Attorney and Solicitor—Articled Clerk—Service under Articles—Office or Employment—Acting as Steward of a Manor—*23 & 24 *Vict. c.* 127, *s.* 10.

The 10th section of the 23 & 24 Vict. c. 127 enacts that no person bound by articles of clerkship to any attorney, &c., shall during the term of service hold any office or engage in any employment whatever other than the employment of clerk to such attorney, &c., in the business, &c., of an attorney, &c., save as by the 6 & 7 Vict. c. 73, and that act otherwise provided:—

Held, that an articled clerk was not guilty of an infraction of this provision, by having during his articles held the appointment of steward of a manor in which his family and himself were beneficially interested,—the duties being performed by a deputy (with whom he divided the fees), and the clerk having thrice only during two or three years, with his principal's consent, absented himself for a day in order to hold courts.

R. E. Turner moved on behalf of Walter Peppercorn for an order directing the examiners to grant him a certificate under the statute 23 & 24 Vict. c. 127, s. 11. The circumstances under which the application was made are detailed in the affidavit of Mr. Peppercorn, as follows:—

"On the 1st of February, 1861, I entered into articles of clerkship with Mr. Jennings, solicitor, Burton-upon-Trent, and on the 22nd of June, 1865, was assigned to Mr. Hawkins, for the remainder of my term of four years. I was in Hilary Term last duly examined, and the examiners have certified that they find me fit and capable to act as an attorney, &c., but, owing to circumstances hereinafter mentioned, they withhold their certificate until I obtain an order from this court to the effect that the service under my articles has satisfied the act of parliament. My father was steward

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of the manor of Headington, in the county of Oxford, up to the time of his death, in July, 1864; and upon his death it became necessary to appoint a steward in his place. My brother-in-law was before my father's death, and still is, the lord of the manor, formerly as trustee for my father, and now for my mother, who has a life-interest in the same under my father's will; and, upon the the death of my mother, the manor will become divisible amongst myself and my brothers and sisters in equal shares. My father always expressed a desire that I should be appointed after his death steward of the manor, in his place; and, upon his death, my brother-in-law accordingly, and also by desire of my family, appointed me such steward, in which capacity I first acted in December, 1864. I appointed a solicitor to act as my deputy; and the general business of the manor has been transacted by him. The only way in which I have acted in the business of the said manor has been to be present at the courts to admit tenants and take surrenders; for, as the conduct of the manor would be left to me when I should be admitted, I considered it my duty to become as much acquainted with the customs of the manor and duties of a steward as possible. I have been absent during my articles on three occasions of one day each, for the purpose of being present at those courts, with my principal's consent. The fees of the courts have by agreement been divided between myself and my deputy steward. I was aware that an articled clerk could not legally take fees as a solicitor during his clerkship; but, as the appointment of steward of a manor does not necessarily fall on a solicitor, I never imagined I was doing wrong in taking the appointment, and did so more with the view of looking after my own and my relations' interests than from any idea of emolument; and the money I have received has been hardly sufficient to defray my expenses out of pocket; and, the whole control of the manor having been with my family for so long, I looked upon my appointment more in the light of private property than otherwise."

The objection on the part of the examiners arose upon the 10th section of the act, which enacts, "No person hereafter bound by articles of clerkship to any attorney or solicitor shall during the term of service mentioned in such articles *hold any office or engage in any employment whatsoever other than the employment of clerk to*

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such attorney or solicitor, and his partner or partners (if any), in the business, practice, or employment of an attorney or solicitor, save as by the first hereinbefore mentioned act (1), or this act otherwise provided; and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under s. 14 of the first hereinbefore mentioned act that he has not held any office or engaged in any employment contrary to this enactment; and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose."

An application has already been made to the Court of Queen's Bench; and that Court, being of opinion that the case fell within the letter, if not within the spirit of the statute, and that they had no discretion in the matter, declined to make any order.

The act, it is submitted, applies to an office or employment which has for an appreciable period taken the articled clerk away from the service of his principal, and not to a short absence by the permission of his employer for a purpose like this.

[BYLES, J., referring to *In re Taylor* (2), asked whether, in the event of the service being held insufficient, the clerk would be bound to serve the whole time again, or only a portion of it?

ERLE, C.J. The clerk is required by the 14th section of the 6 & 7 Vict. c. 73, to prove affirmatively that "he hath actually and really served and been employed by such practising attorney, &c., during the whole time and in the manner required by the provisions of that act." It is clear that this gentleman has been within the spirit and the words of that section employed in the business of an attorney. I see no reason why he should not have made the affidavit which the statute requires. What power have we to order the examiners to give him a certificate?]

The examiners are officers of the Court, appointed by rule of Court, and responsible to the Court.

Cur. adv. vult.

The opinion of the Court (Erle, C.J., Byles, Keating, and Montague Smith, JJ.), was delivered by

(May 3.) ERLE, C.J. We are of opinion that the service of

(1) 6 & 7 Vict. c. 73. (2) 4 B. & C. 341.

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the applicant under his articles has been sufficient, within the meaning of the statute, and that his affidavit explains the very peculiar circumstances under which he became for a time steward of the manor of Headington, so as to entitle him to his certificate. It appears that the inheritance of the manor itself devolved on his family on the death of his father, and with it the office of steward in a manner devolved on him as the legal member of his family. He held it at the request of his mother, brothers, and sisters, performing the duties by deputy, and having consumed only two or three days in two or three years in visits to the manor court, with the leave of his employer, acquiring thereby professional knowledge, and at the same time protecting a property in which he has an interest.

We have come to this conclusion after conferring with the judges of the Court of Queen's Bench.(1)

Rule accordingly.

Attorneys for applicant: *Hawkins, Bloxam, Paterson, & Power.*

Feb. 12.

BROOKS *v.* JENNINGS.

Debtor and Creditor—Composition Deed under s. 192 *of the Bankruptcy Act,* 1861 (24 *&* 25 *Vict. c.* 134)*—Composition payable within the Time limited for registering the Deed—Recital of Agreement to pay the Composition—Plea to the further Maintenance of the Action.*

It is no objection to a deed of composition under the 192nd section of the Bankruptcy Act, 1861, that the composition is payable before the expiration of the twenty-eight days allowed by s. 194 for registering the deed.

A recital in such a deed, that the debtor has agreed to pay a composition of a given amount to all his creditors, amounts to a covenant.

No formal commencement being, since the Common Law Procedure Act, 1854, necessary to a plea to the further maintenance of an action, it is enough if it discloses on the face of it matter which arose since the commencement of the action; and, if it be ambiguous and calculated to embarrass the plaintiff, he should apply to a judge.

To an action for goods sold and delivered, and money found due upon accounts stated, in which the plaintiff claimed 100*l.*, commenced before the 21st November, 1865, the defendant pleaded,

(1) 1 B. & C. 311.

that, after the accruing of the plaintiff's claim, to wit, on the 14th of November, 1865, the defendant, being indebted to the plaintiff and divers other persons, made and entered into the deed following, that is to say:—"This indenture, made the 14th of November, 1865, between the several persons whose names are subscribed and seals affixed in the schedule hereunder written (being respectively creditors, &c.) on behalf of themselves and all and every other the creditors of the said J. C. Jennings, of the first part, and the said J. C. Jennings, &c., hereinafter called the said debtor, of the second part: Whereas the said debtor is indebted to the said several persons parties hereto of the first part, in the several sums of money set opposite to their respective names in the said schedule hereinunder written, and is also indebted to certain other persons in divers sums of money, and, being unable to discharge the same in full, has agreed to pay a composition of 2*s.* in the pound, such payment or composition to be made and paid to all and every the creditors of the said debtor, whether executing this deed or not, *on the* 21*st day of November instant,* and to be in full discharge of all and every the debts of the said debtor due and owing at the time of the execution of these presents: Now, this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the payment by the said debtor to the said several creditors of such composition as aforesaid, they the said several persons parties hereto of the first part, for themselves and their several and respective partners, do hereby accept the said composition in full satisfaction and discharge of their respective debts, and do by these presents release and for ever quit claim unto the said debtor, his heirs, executors, and administrators, all and all manner of actions, &c., claims and demands whatsoever which they the said several persons parties hereto of the first part and their several and respective partners now have or at any time heretofore had against the said debtor: And it is hereby lastly agreed and declared that these presents are intended to operate, and shall (so far as lawfully may be) operate as a deed of composition within the provisions of the Bankruptcy Act, 1861; and that, so soon as a majority in number representing three fourths in value of the creditors of the said debtor shall have executed or in writing assented to these presents, it is intended that the same shall be registered in the

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Court of Bankruptcy, under the 194th section of the said act, in order that the said debtor may obtain the protection of the court as provided by the 198th section. In witness," &c. Averment, that a majority in number representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, had in writing assented to and approved of the said deed, and that the deed was duly executed by the defendant, attested, and registered; and that, at the time of the execution of the said deed, the plaintiff was a creditor of the defendant in respect of the matters thereinbefore pleaded to, within the meaning of the Bankruptcy Act, 1861, and all the conditions having been performed, and all things happened in that behalf, the plaintiff became and was and is bound by the said deed as if he had been a party thereto and had duly executed the same; and that, on the said 21st of November, 1865, *being after action*, the defendant was ready and willing to pay and then tendered and offered to the plaintiff 7*l.* 16*s.* 6*d.*, being the said composition on the plaintiff's said debt, to receive which of the defendant the plaintiff wholly refused; and the defendant had always since been ready and willing to pay the same to the plaintiff, and he now brought the same into court ready to be paid to the plaintiff.

The plaintiff demurred to this plea, on the ground that "the deed is not pleadable in bar to the action." Joinder.

Philbrick, in support of the demurrer. The deed in question is clearly not pleadable in bar. It is dated the 14th of November; the composition is to be paid on the 21st; and until payment there is no release. The action was commenced before the composition was payable, and the plea does not profess to be to the further maintenance of the action.

[WILLES, J. That is immaterial; no formal commencement or conclusion is now necessary in the case of a plea of matter subsequent to the action: 15 & 16 Vict. c. 76, s. 68.]

The deed is unreasonable. There is nothing but a bare covenant by the debtor to pay the composition, without any assignment, and without a trustee. It is not such an arrangement as a non-assenting creditor ought to be held bound by.

[MONTAGUE SMITH, J. Each creditor would have a remedy on

the deed; or, if the composition was not paid or tendered, the remedy for the original debt would remain.]

There are twenty-eight days allowed for the registration of deeds under the act; and the Court has no power to extend the time. (1) This deed covenants for the payment of the composition seven days after its date. Is it reasonable that a creditor should be compelled to elect whether to accept the composition or not before he can know that the deed is a valid deed or will ever be perfected?

[WILLES, J. His acceptance of the composition would not bind him unless the deed was duly perfected by registration.

MONTAGUE SMITH, J. The clause at the end of the deed shews that it is to operate as a deed under the Bankruptcy Act, or not at all.]

Any deed must be registered, whether a binding deed or not.

E. Jenkins, for the defendant. The first objection is disposed of by the case of *Gresty* v. *Gibson*. (2) A composition payable at the time of the execution of the deed was held to be no objection in *Ex parte Godden, In re Shettle*. (3) Besides, if the plaintiff had accepted the 2*s*. in the pound, he might afterwards have sued for the remaining 18*s*. if the defendant failed to perfect the deed. In *Dingwall* v. *Edwards* (4), 2*s*. in the pound was to be paid in cash, and 10*s*. more by instalments of 2*s*. 6*d*. each, secured by promissory notes; and, though the Court were equally divided, all agreed that there was no objection to the 2*s*. being paid at the time of the execution of the deed.

Philbrick, in reply. *Ex parte Godden* (3) has not been uniformly assented to. Besides, the only point expressly decided there was, that the word "creditors" in s. 192 comprised the secured as well as the unsecured creditors. In *Dingwall* v. *Edwards* (4), the deed was free from any of the objections urged here. There was a trustee, and a surety, and there was a further instalment of the composition to be paid at a future day; and the release was on the assent to a composition, not on payment of the 2*s*.

WILLES, J. I am of opinion that the objections urged against

(1) *In re Skinner*, 34 L. J. (Bkr.) 9
(2) Law Rep. 1 Ex. 112.
(3) 32 L. J. (Bkr.) 37.
(4) 4 B. & S. 738; 33 L. J. (Q.B.) 161.

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this plea are not sustainable, and that our judgment must be for the defendant. The first objection was, that, although the plea discloses only matter of defence arising after action brought, it does not profess to be pleaded to the further maintenance of the action. That is at the best a mere formal objection; and, inasmuch as the plea fully sets out facts which shew that the defence arose after the commencement of the action, the plaintiff ought to have admitted the validity of that defence, and claimed costs up to the time of pleading, under the Pleading Rules, 22, 23, of Hilary Term, 1853. Moreover, the objection is answered by a reference to the 68th section of the Common Law Procedure Act, 1852, which was intended to meet such a case. Before the case of *Owen* v. *Waters* (1), there was a difference of opinion amongst pleaders as to whether it was necessary, in declaring upon a bill of exchange, to aver that the period of the currency of the bill had elapsed before the commencement of the action. That case decided that it was enough to say "which period had now elapsed," and that under that averment the plaintiff was bound to shew that the period for payment of the bill had elapsed before the commencement of the action. Notwithstanding that decision, it was still held to be necessary to shew in a plea that the matter of defence arose before suit. That left a plea which was in substance sufficient open to objection; and accordingly it was determined to remove that with many other formal objections to pleadings; and this was effected by s. 68, which provides that "any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion." The present plea is pleaded according to the fact, and shews a defence arising after the commencement of the action. The section goes on to provide for any inconvenience which might result from ambiguity in the plea in that respect,—"and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action." That puts pleas upon the same footing in this respect as declarations. If the plaintiff felt embarrassed by the frame of the plea, he might have proceeded under the latter part of the section, or he might have applied to a judge at chambers to

(1) 2 M. & W. 91.

rectify it. For these reasons, it appears to me that this plea is not open to the formal objection.

Then it is said that the deed set up affords no answer to the action. It provides that it shall operate as a composition deed under the Bankruptcy Act, 1861, if a composition of 2*s.* in the pound be paid to the several creditors, whether executing the deed or not, on a certain day. It is said that this is illusory, as leaving it at the option of the debtor to pay or tender the composition or not. I am however of opinion, upon the authority of the cases cited by Mr. Jenkins, as well as of the case of *Lay* v. *Mottram* (1) in this Court, upon which the decision in *Gresty* v. *Gibson* (2) professes to rest, that the recital is so framed as to amount to a covenant, and to enable any creditor, whether he has executed the deed or not, to maintain an action thereupon for the composition. But, even if this were not so, the deed would not be invalid on that ground; for, if the composition were not paid, the creditors would be remitted to their remedy for their original debts.

It is then said that the day appointed for the payment of the composition is before the expiration of the twenty-eight days allowed by the statute for registering the deed: and it is suggested that it is hard that a creditor should be obliged to act upon the composition being tendered to him, when his acting might amount to an assenting to the deed, though the required number of creditors may not sign so that the deed may be binding on all within the twenty-eight days. That, however, is no hardship. A creditor may well say, when the tender is made: "I decline to accept the 2*s.* in the pound until I ascertain whether the deed is binding or not." If it should turn out that the deed is not binding, he might sue for his debt: and, if it should turn out to be a valid and binding deed, there would be nothing to prevent his demanding the composition afterwards: or,—which perhaps would be the more prudent course,—the creditor might take the 2*s.* in the pound when tendered, intimating that he did not assent, but might insist upon having the remaining 18*s.*, unless it should turn out that he was bound by the deed. Upon the whole, I think the defendant is entitled to judgment.

KEATING, J. I am of the same opinion. As to the first objec-

(1) 19 C. B. (N.S.) 479. (2) Law Rep. 1 Ex. 112.

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tion, since the 68th section of the Common Law Procedure Act, 1852, it is no longer necessary that a plea to the further maintenance of the action should have a formal commencement. Looking at the substance of this plea, it cannot be doubted that it is a plea to the further maintenance of the action. The defendant sets forth the substance of the deed, which bears date after the commencement of the action, and alleges that he tendered the composition, and he brings the money into court. The plaintiff could not have been embarrassed; he might have taken the money out, and proceeded to tax his costs down to the time of pleading. As to the other objection, that the deed is unreasonable because the composition of 2s. in the pound is to be paid before the expiration of the twenty-eight days allowed by the statute for registering the deed, I think the plaintiff has failed to shew that that imposes upon him any real hardship; for, as my Brother Willes has pointed out, he might either accept or reject the composition. His acceptance would not bind him, if it should turn out that the deed was not a binding deed.

MONTAGUE SMITH, J. I also am of opinion that the plea is a good one. I agree with my two learned Brothers that it is no longer necessary that the plea should contain any formal statement that the matter of defence therein set up arose after the last pleading or after the commencement of the action. On the second question also, I think the deed upon which the plea is founded affords a good answer to the action. A somewhat similar deed was sustained in *Ex parte Castleton.* (1) This is a composition deed intended to operate under the statute. Mr. Philbrick contends that it is an invalid deed, because the day named for the payment of the composition is within the twenty-eight days allowed by s. 194 for registering it. That, however, is a maximum period; the deed may be registered in a much shorter time. I see nothing unreasonable in the provision that the composition shall be paid within a shorter time, within which the assent of all the creditors may well be obtained. As far as the authorities go, they seem to me to be in favour of the defendant. In *Ex parte Godden, In re Shettle* (2), the composition was to be paid down. The point was not raised before the Lords Justices; but Mr. Commissioner

(1) 31 L. J. (Bkr.) 71. (2) 32 L. J. (Bkr.) 37.

Holroyd seems to have thought that a circumstance in favour of the validity of the deed; for, he says: "There is this further point in the case, that, in this deed there is not, as in *Walter* v. *Adcock* (1), a covenant to pay in futuro, but an engagement to pay the amount of the composition at once." It seems to me, therefore, as well upon the reason of the thing as upon the authorities cited, that the provision for the payment of the composition within the twenty-eight days does not invalidate the deed.

Judgment for the defendant.

Attorneys for plaintiff: *Ashley & Lee.*

Attorney for defendant: *Thomas Beard.*

BARTLETT *v.* STINTON.

April 20.

Practice—Setting aside Execution for Irregularity—Imposition by the Judge of Terms.

The Court will not interfere with the discretion of a judge at chambers, where, upon a summons to set aside an execution for irregularity, *with costs*, he makes the order as prayed, adding, as a condition, that the defendant bring no action,—even though the order has not been drawn up.

A WRIT of summons issued against the defendant on the 28th of February, and judgment was duly signed for want of appearance. The plaintiff would according to the practice be entitled to execution on the 16th of March. He, however, issued a ca. sa. on the 10th, and the defendant's goods were seized thereunder by the sheriff. On the same day, the defendant took out a summons to set aside the execution for irregularity, *with costs*. This summons was heard by Willes, J., on the 12th, and he made an order to set aside the ca. sa. and subsequent proceedings, with costs; but, notwithstanding the strenuous opposition of the defendant, he imposed as a term that no action should be brought. The debt and costs were paid on the 16th. The order was never drawn up; but the sheriff had withdrawn from possession, though whether before or after the money was paid did not appear.

Kenealy moved that so much of the order as directed that no

(1) 7 H. & N. 541; 31 L. J. (Ex.) 380.

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action should be brought might be rescinded. He contended that the learned judge had no authority to impose the condition complained of; and he referred to *Cash* v. *Wells* (1), where it was laid down that the application for setting aside a judgment as having been signed against good faith is ex debito justitiæ, and the Court will not impose upon the defendant as a condition for setting it aside, that he bring no action.

[ERLE, C.J. It was an original application there.]

There can be no difference in principle between an original application and a motion to rescind or vary an order. The learned judge by the course he has taken precludes the defendant from his ordinary remedy for a grievous wrong, without knowing anything of the circumstances of the case. The defendant was not bound to accept the condition, and he had a right to abandon the order.

ERLE, C.J. The defendant applied to the learned judge for that which was in his discretion. By the summons he asked for costs; and he got the order made with costs, on the terms of bringing no action. Having submitted himself to the discretion of the judge, he cannot complain of the manner in which that discretion has been exercised.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorney for defendant: *Stinton.*

May 1.

BANKART AND ANOTHER *v.* BOWERS.

Vendor and Purchaser—Contract of Sale—Concurrent Stipulations.

purchase of

By a memorandum of agreement, A agreed to ~~sell to~~ B certain lands, therein described, and all the mines, beds, and veins of coal, &c., under the same, at a certain price; and B agreed to purchase from A all coal that he might from time to time require, at a fair market price:—

Held, that these were concurrent acts; and that A could not sue B for not taking the coal, without averring performance or a readiness to perform his part of the agreement.

THE first count of the declaration stated, that by an agreement dated the 31st of July, 1863, and made between the defendant of

(1) 1 B. & Ad. 375.

the one part and the plaintiffs of the other part, it was agreed that the defendant should sell to the plaintiffs, and that the plaintiffs should purchase from the defendant, the equity of redemption of and in certain lands &c., known as the Turnhurst Hall estate, in Wolstanton, in the county of Stafford, save and except certain closes therein described, and of and in all the mines, beds, and veins of coal, ironstone, and other mineral within and under the same, together with all the engines, colliery buildings, and plant then being upon the same estate; and that payment should be made for the same by the plaintiffs on the terms and in the manner therein mentioned: and the defendant by the said agreement, and in consideration of the premises, agreed with the plaintiffs that the defendant would purchase from the plaintiffs all coal that the defendant might require from time to time, at the fair market rate: Averment, that although all things on the plaintiffs' part had been duly performed and fulfilled according to the terms of the agreement necessary to entitle the plaintiffs to sue for the breach thereinafter mentioned, and although the plaintiffs were and still continued and always had been from the making of the said agreement, ready and willing to sell and supply to the defendant such coal as the defendant required, at the fair market rate, according to the terms of the agreement and the true intent and meaning thereof: Breach, that the defendant did not after the making of the agreement purchase or take from the plaintiffs all coal that he required, according to the agreement, or more than a very small and inconsiderable quantity of the coal which he required, and a much less quantity thereof than was by him so agreed to be purchased and taken, and on the contrary he took large quantities of coal from persons other than the plaintiffs, whereby the plaintiffs lost profits &c.

Plea, that the agreement in the first count mentioned was and is an agreement in writing, in the words and figures following, that is to say, "Memorandum of agreement made this 31st of July, 1863, between G. F. Bowers, of &c., china manufacturer, of the one part, and F. Bankart, of &c., and H. Bankart, of &c., copper-smelters, of the other part, as follows:—1. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart and H. Bankart agree to purchase from

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him, the equity of redemption in all the mines, beds, and veins of coal, ironstone, and other minerals within and under the estate called the Turnhurst Hall estate, situate &c., containing in the whole 110A. 3R. 27P., or thereabouts, together with all the engines, colliery buildings, and plant now being upon the said estate, which together with the surface of the estate are subject to a mortgage of 1750*l.* to Messrs. C. & J., and also all the rights and interests of the said G. F. Bowers under a contract entered into by him on the 9th of March, 1863, with T. F. H., for the granting by him to the said G. F. Bowers for the term of forty-two years from the 31st of January, 1863, of power and authority to use a certain railway or tramway to be constructed over lands of the said T. F. H. at &c. 2. The consideration for such purchase shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of 2000*l.* in manner following, 500*l.* in cash on the execution of the conveyance, and the remainder in bills of exchange for 1500*l.* and interest extending over nine months from the execution of the said conveyance. 3. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart and H. Bankart agree to purchase of him, the equity of redemption in the whole of the said Turnhurst Hall estate, the mines and minerals in and under which are hereby contracted for, with the mansion-house called Turnhurst Hall, and the other buildings thereon (except the field called Big Brent, containing 8A. 3R. 11P., or thereabouts, and also except such portion of the field called Delph Field as is marked off with a red outline on a certain plan &c., for house-building purposes only. 4. The consideration for said purchase of the surface of the said estate, mansion-house, and buildings (except as aforesaid), shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of the sum of 4000*l.* in manner following,—the sum of 2000*l.* in cash on the execution of the conveyance, and the remainder in bills of exchange for 2000*l.* and interest extending over two years from the execution of the conveyance. 5. The said F. Bankart and H. Bankart shall take upon themselves all the engagements and liabilities of the said G. F. Bowers under the said agreement with the said T. F. H., and shall protect and indemnify the said G. F. Bowers from and against all such engagements and liabilities. 6. The said F.

Bankart and H. Bankart shall be entitled to the rent of the surface of the Turnhurst Hall estate as from the 24th June, 1863. 7. *The said G. F. Bowers shall purchase from the said F. Bankart and H. Bankart all coal that he may from time to time require, at the fair market rate.* 8. The said G. F. Bowers shall deduce a good title to all the property comprised in this agreement:" Averment, that it was not agreed by and between the defendant and the plaintiffs as in the first count mentioned, save and except as in and by the said written agreement in this plea particularly set forth as aforesaid; and that the plaintiffs did not nor would purchase from the defendant, although the defendant was ready and willing to sell to the plaintiffs, the said equity of redemption, or the engines, colliery buildings, or plant in the first count mentioned, on the terms in the said agreement mentioned.

Demurrer, on the ground that the completion of the purchase was not a condition precedent to the performance of the contract declared on. Joinder.

Watkin Williams, in support of the demurrer, contended that it was not a condition precedent to the defendant's liability to the plaintiffs for the non-performance of the contract contained in the seventh clause of the agreement, viz. that he would purchase from them all the coal he might from time to time require, that the plaintiffs should perform the contract on their part contained in the first clause, viz. purchase and pay for the estate contracted to be sold to them; but that the two were totally distinct and independent covenants, giving to either party a remedy against the other by an action for a breach, according to the rules laid down in the notes to *Pordage* v. *Cole*. (1)

T. Jones, in support of the plea. This is an agreement for the purchase of an estate by the plaintiffs from the defendant, and for the purchase of coal by the defendant from the plaintiffs. The plaintiffs are not willing to take the estate, but seek to compel the defendant to take all his coal from them. It must be conceded that the acceptance of the estate is not a condition precedent; but it is a condition concurrent, and the plaintiffs must be ready and willing to execute the contract on their part before they

(1) 1 Wms'. Saund. 319 l.

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can call upon the defendant to perform his part of it. The reasonable construction of the contract is, that the whole is to date from the conveyance of the estate. The case falls within the 5th rule given in the notes to *Pordage* v. *Cole* (1): "Where two acts are to be done at *the same time*, as, where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay a sum of money on *the same day*, neither can maintain an action without shewing performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale." As to the averment of readiness and willingness, it is said in the notes to *Peeters* v. *Opie* (2): "The nature and necessity of such averments was much considered in a late case,—*Rawson* v. *Johnson* (3),—which was assumpsit for the non-delivery of 100 qrs. of malt, which the defendant had undertaken to deliver on request at a certain price; and the plaintiff averred that, although afterwards, to wit, on &c., he requested the defendant to deliver him the 100 qrs. of malt, and was then and there *ready and willing to pay the said defendant for the same* according to the terms of the said sale, and although he was then and there *ready and willing, and offered to accept and receive* the said 100 qrs. of malt from the defendant, yet he refused to deliver them. After verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff did not aver *the actual tender of the price agreed upon*, the averment of a readiness and willingness only in the plaintiff to pay not being sufficient. But the Court overruled the objection, and held the averment of the plaintiff's readiness and willingness to pay for the malt sufficient; that under that averment the plaintiff was bound to prove that he was prepared to pay or tendered the money, if the defendant had been ready to receive it and to deliver the malt." So here, to effectuate the intention of the parties, the plaintiffs should have been ready and willing to take a conveyance of the estate and to pay the money on the day stipulated. Again, in *Morton* v. *Lamb* (4), also cited in the notes to *Peeters* v. *Opie* (5), the Court held, that, "where two concurrent acts are to be done, the party who sues the other for non-per-

(1) 1 Wms'. Saund. 320 e. (2) 2 Wms'. Saund. 352 a. (3) 1 East, 203.
(4) 7 T. R. 125. (5) 2 Wms'. Saund. 352 c.

formance must aver that he has performed, or was ready to perform, his part of the contract."

Williams, in reply. No doubt, if the two covenants or contracts be dependent the one on the other, neither can sue the other for a breach without shewing performance or readiness and willingness to perform the contract on his part. Here the covenants are totally independent. The defendant bound himself to take the coal immediately. He could not delay till a perfect title to the estate had been made, which might take a considerable time. The Court cannot speculate upon the intention of the parties. They can only deal with the agreement as they find it: *Hale* v. *Rawson*. (1)

ERLE, C.J. I am of opinion that our judgment upon this demurrer should be for the defendant. Where there is a contract by one party to sell an article and by the other party to pay for it, no time being named, it would be a strong thing to say that the buyer shall pay the money before he gets the consideration. The effect of the agreement set out in the plea is, that the plaintiffs are to buy the mines and minerals from the defendant, and the defendant is take all the coals he may require from the plaintiffs. These clearly are concurrent acts.

BYLES, J. The effect of Mr. Watkin Williams's argument is, that the defendant must keep the mines, and yet is bound to buy his coals of the plaintiffs.

KEATING, J. We must look to the whole agreement in order to ascertain what was the intention of the parties. We should obviously be frustrating that, if we were to yield to the argument of Mr. Williams.

MONTAGUE SMITH, J., concurred.

Judgment for the defendant.

Attorneys for plaintiffs: *Peacopp & Watson.*

Attorney for defendant: *T. Price.*

(1) 4 C. B. (N.S.) 85.

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May 1.

ROBINSON *v.* WRAY.

Construction of Inclosure Act—Lord's Interest in the Soil of the Waste—Right of Shooting.

By an inclosure act, the commissioners were authorized to apportion to the lord of the manor, *in satisfaction for his right and interest as such lord*, a certain quantity of the waste in cattle-gates. By a subsequent section,—reciting that the waste was of such small value as not to bear the expense of being allotted,—the commissioners were impowered to set it out in one inclosure, and to regulate the stint among the owners of land entitled to rights of common, awarding them sheep-gates in proportion to their several rights. The proprietors or persons entitled to the greater part of the sheep-gates were then impowered, with the consent of the lord, to appoint commissioners to divide this stinted pasture into allotments "to and amongst the proprietors of the said common or waste land, in proportion to their respective rights and interests therein." A further section reserved to the lord the right "to enjoy, search for, and work all mines, minerals, and other rights and privileges in the said waste (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the act had not been made":—

Held, that the effect of the act was, to take from the lord his right to the soil of the waste, and with it the exclusive right of sporting thereon.

THIS was an action brought by the plaintiff against the defendant for trespassing upon certain stinted pastures called Wasset Fell and Bishopdale Edge in pursuit of game. The following case was stated for the opinion of the Court, without pleadings:

1. For several years prior to and at the time of the passing of the inclosure act hereinafter referred to, W. Purchas was the lord of the manor of Thoralby, in the north riding of Yorkshire, and as such was owner of a tract of common waste or uninclosed ground called Wasset Fell and Bishopdale Edge mentioned in the said act, and containing by estimation 950 acres or thereabouts.

2. As owner of the soil of the said common or waste ground, he had before and at the time of passing the said act the full and exclusive exercise, right, and liberty, by himself, his deputies and licensees, of shooting and killing grouse and other game thereon.

3. In the year 1811, an act of parliament (51 Geo. 3, c. 6, not printed) was passed, intituled "An act for dividing and inclosing lands in the manor of Thoralby and parish of Aisgarth, in the north riding of the county of York."

4. The act recites the existence of several stinted pastures and of the said tract of common waste or uninclosed ground called Wasset Fell and Bishopdale Edge; that the said W. Purchas was or claimed to be lord and owner of the said manor of Thoralby, and as such to be seised of and entitled unto the soil and inheritance in and to the mines and minerals within and under the said common and waste ground; and that the said W. Purchas and divers other persons therein named were respectively owners and proprietors of messuages and ancient inclosed lands, and in respect thereof, or as appendant, appurtenant, or belonging thereto, they, or their lessees or tenants, were entitled to a right of common upon the said common or waste ground called Wasset Fell or Bishopdale Edge, at all times of the year, without stint.

5. The act enacts that J. Humphries and W. Norton, therein described, should be the commissioners for surveying, dividing, setting out, allotting, and inclosing the said stinted pastures, common, and waste ground, amongst the several persons interested therein.

6. It further enacts that the commissioners should set out, appoint, and apportion in cattle-gates for the said W. Purchas one full eighteenth part of the said common and waste ground, and no more, in recompense and full satisfaction for his right and interest as lord of the said manor, exclusive of such share thereof as he was entitled to in respect of his messuages, lands, and tenements, to which a right of common in the said common or waste ground was appendant or appurtenant as aforesaid.

7. Further, after reciting that the whole or the greatest part of the said common or waste ground was of little value, consisting chiefly of peat-earth and ling, and would not at present pay the expense of being subdivided into allotments, and the owners of messuages, lands, and tenements within the said manor interested therein were desirous that the said common or waste ground should only be ring-fenced, and held and occupied as a common stinted pasture,—it enacts that the commissioners should, and they were required to, set out the said common or waste ground called Wasset Fell and Bishopdale Edge in one allotment or inclosure, and ascertain, specify, and set forth in their award the proportional value of the same, for regulating the stint thereof, and the number

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of cattle-gates which the said common or waste ground should be capable of agisting or depasturing, and the respective cattle-gates or shares of cattle-gates to which all and every the owners of messuages and lands within the said manor interested therein should be entitled to in respect of such messuages and lands; and that the cattle-gates and shares of cattle-gates to be appointed and set out as aforesaid should be estimated, allotted, and apportioned by the commissioners to and amongst the said owners of messuages and lands in the proportions they were respectively rated to the land-tax for the township of Newbiggin and Bishopdale, within the said manor, for the year 1803; and that the said commissioners should likewise order and direct that the said common or waste ground, as soon as conveniently might be after the passing of the act, should be inclosed with a strong wall or sufficient fence, and should direct and award the said wall or fence to be kept in repair at the costs and charges of the persons entitled to cattle-gates therein, in proportion to the number of gates allotted or awarded to each of them; and that the same might be staff-herded until such fence and the inclosure could be made.

8. The act further enacts, that it shall be lawful for the several owners for the time being of the common or waste ground (thereby directed to be set out as a stinted pasture), or of cattle-gates thereon, or the greater part in value of such proprietors (such value to be ascertained by the number of such cattle-gates), from time to time, after the execution of the commissioners' award, by writing under their hands, to make rules and regulations as to the stocking the said common or waste ground with cattle, sheep, horses, and other stock.

9. Power is given by the act to the commissioners, on the request in writing of the tenants for life, &c., to sell part of their respective allotments or cattle-gates on the said common or waste ground in respect of such messuages, lands, and tenements, to pay the expenses of the act and other expenses.

10. And it is further enacted, that it shall be lawful to and for the several proprietors or persons entitled to the greatest part of the cattle-gates upon the said common or waste ground when inclosed as aforesaid and converted into a stinted pasture, by and with the consent of the lord of the manor of Thoralby for the time

being, under his hand, from time to time, and at any time after the execution of the said award, by writing under their hands to elect and appoint one or more commissioner or commissioners to set out and divide the same into allotments to and amongst the proprietors of the said common or waste ground, in proportion to their respective rights and interest therein; which commissioner or commissioners so to be elected and appointed shall have and be invested in every respect with all requisite powers and authorities for the purpose of effecting such future division as the commissioners thereby appointed are invested with; and in the meantime to make such rules and orders for regulating and occupying the said stinted pasture as thereinbefore mentioned.

11. It was further enacted that nothing in the act contained should be construed to defeat, lessen, or prejudice the right or interest of the said W. Purchas of, in, and to all seignories or royalties, mines and minerals, incident and belonging thereto, or in or under the said common or waste ground by the act directed to be allotted, divided, and inclosed; but that he should and might hold and enjoy, search for, and work all such mines, minerals, and other rights and privileges in the said common or waste ground (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the act had not been made; making, nevertheless, reasonable satisfaction to the person or persons, owner or owners, or occupier or occupiers, of any allotment or allotments, for any damage which should or might be done or occasioned to their grounds or cattle by working such mines and minerals.

12. The act also saves to the King's Majesty, his heirs and successors, and to all other person and persons, &c. (except the several persons to whom any allotment or allotments or other compensation should be made by virtue of the act, and except such other rights as the intents and purposes of the act should require to be barred, destroyed, or extinguished), all such estates, rights, &c., of, in, and to the said stinted pasture, common, and other waste ground thereby directed to be divided, allotted, and inclosed, as they had enjoyed before the passing of the act, or could or might have had and enjoyed in case the act had not been made.

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13. An award was made and published by the commissioners on the 19th of June, 1816, in pursuance of the act.

In paragraphs 14–20 the award was set out at length: by it the commissioners set out the moor or common called Wasset Fell and Bishopdale Edge in one allotment or inclosure as a stinted pasture; and they found that Wasset Fell, belonging to the Newbiggin proprietors, would depasture 500 sheep, and Bishopdale Edge, belonging to the Bishopdale proprietors, would depasture 350 sheep,—making in the whole 850 gates: and, at the request of the proprietors, they allotted the same separately to the respective proprietors. They awarded to W. Purchas, his heirs and assigns, for ever, as and for his eighteenth part or share of the said moor or common as lord of the manor of Thoralby, twenty seven sheep-gates, and also eight tenths of another such sheep-gate, in and throughout Wasset Fell, together with the ground and soil of the same, in proportion to the said sheep-gates; and they awarded him, in like manner, nineteen and a half sheep-gates over Bishopdale Edge; also, in respect of his lands in Newbiggin, fifty three sheep-gates and one tenth of another such sheep-gate over Wasset Fell; and in respect of his lands in Bishopdale twenty six sheep-gates over Bishopdale Edge, together with the soil, &c. And the commissioners awarded unto W. R. Wray, his heirs and assigns, in respect of his lands in Newbiggin, fourteen sheep-gates and also two tenth parts of another such sheep-gate over Wasset Fell; and in respect of his lands in Bishopdale, twenty five sheep-gates over Bishopdale Edge; together with the ground and soil of the same respectively, in proportion to such sheep-gates.

21. Except so far as the estate, rights, and interests of W. Purchas in the said tract of common and waste ground were affected by the act and award, W. Purchas remained seised of and entitled to the soil and inheritance of the said tract of common and waste ground as at the time of the passing of the act; and, at the time of the committing of the trespass complained of, all the estate, rights, and interests of W. Purchas were vested in the plaintiff.

22. In the year 1861, W. R. Wray died; and the sheep-gates on Wasset Fell and Bishopdale Edge respectively awarded to him, and all his estate, rights, and interests in the same, were at

the time of the committing of the trespasses complained of vested in the defendant.

23. Since the passing of the inclosure act, and the execution of the award, several of the proprietors to whom sheep-gates were awarded have conveyed them to purchasers, together with the ground and soil thereof, by the usual modes of assurance: and down to the present time, each of the said proprietors of sheep-gates upon Wasset Fell and Bishopdale Edge respectively (including the lord of the manor of Thoralby for the time being) has by himself or his tenants depastured sheep upon the same now stinted pastures respectively, according to the number of sheep-gates he was entitled to therein respectively.

24. From the time of the making of the award, the stinted pastures, called Wasset Fell and Bishopdale Edge, have remained stinted pastures, as directed by the award, and up to the present time have not been set out and divided into separate allotments, as provided by the act.

25. The plaintiff claims the sole and exclusive right of shooting and killing game upon each of the stinted pastures.

26. The defendant, as the heir-at-law of W. R. Wray, deceased, claims to be the owner of the several sheep-gates and parts of sheep-gates upon Wasset Fell and Bishopdale Edge respectively as aforesaid awarded to W. R. Wray, and of the ground and soil of the same now stinted pastures respectively, in proportion to such sheep-gates and parts of sheep-gates; and, as such owner, he also claims a concurrent right to shoot and kill game upon each of the same now stinted pastures, along with the plaintiff and the rest of the allottees and owners of sheep-gates in the same pastures respectively.

27. The defendant, on the 12th of August, 1864, entered each of the said stinted pastures called Wasset Fell and Bishopdale Edge, and killed and carried away grouse in and upon each of the same stinted pastures, but without the leave of the plaintiff.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Manisty, Q.C. (*Kemplay* with him), for the plaintiff. To entitle him to maintain this action, the plaintiff must undoubtedly shew

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that he is the owner of the soil of Wasset Fell and Bishopdale Edge. As lord of the manor of Thoralby, he clearly was so; and, unless there be something in the act of parliament to take away his right, he remains so still. A mere right to a cattle-gate does not involve ownership of the soil, though prior to the case of *Rigg* v. *The Earl of Lonsdale* (1), a general notion prevailed in the north of England that it did. Coleridge, J., in delivering the judgment of the court of error in that case, after adverting to the language of the special case, says (2): "Now from this statement, independently of any acts of ownership, we should infer that the cattle-gate owner was not in possession of the soil, but that the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattle-gate owners. And the passages cited from Lord Coke in the course of the argument appear to us conclusive upon this point. He says (3), speaking of what things may be granted by copy of court roll: 'Secondly, underwood, without the soil, may be granted by copy to one and his heirs; and so may the herbage or vesture of land.' And in Co. Litt. 4. b., he says that 'the grant of vesturam terræ or herbagium terræ does not pass the land or soil itself.' Is a cattle-gate, then, a more extensive right than that of vestura terræ, or herbagium terræ? It seems to us certainly not. And the language of the conveyance upon which the admittance is made is strong to shew an exclusion of the soil itself. The words in the conveyance are, 'All those four cattle-gates or beast-grasses *in*, *upon*, and *over* the close of pasture-ground called Bretherdale Bank;' clearly shewing that all that was conveyed was, the feeding of beasts *in* and *upon* the close, but not the close itself." The provisions of the act of parliament in question are somewhat peculiar. It recites the existence of several stinted pastures and of a tract of common or waste called Wasset Fell and Bishopdale Edge, containing about 950 acres, and that Mr. Purchas was lord of the manor of Thoralby, and as such seised of and entitled to the soil and inheritance of the waste, and that he and divers other owners of messuages and ancient inclosed lands had rights of common over the same. It then goes on to enact that the com-

(1) 1 H. & N. 923; 26 L. J. (Ex.) 196.
(2) 1 H. & N. 936; 26 L. J. (Ex.) 198. (3) Co. Litt. 58 b.

missioners shall apportion a certain quantity of the waste in cattle-gates for Purchas, in satisfaction for his right and interest as lord of the manor,—that is, of his interest in the herbage. By a subsequent clause, reciting that the waste was of such small value as not to bear the expense of being allotted, the commissioners were impowered to set it out in one inclosure, and regulate the stint among the several persons entitled to exercise rights of common thereon, awarding them sheep-gates according to their several rights. The proprietors or persons entitled to the greater part of the sheep-gates are then enabled, with the consent of the lord, to appoint commissioners to divide this stinted pasture into allotments "to and amongst the proprietors of the said common or waste land, in proportion to their respective rights and interests therein." As this further allotment can only take place with the lord's consent, he might stipulate for a reservation to himself of the perpetual and exclusive right of shooting. A further provision reserves to the lord the right "to hold and enjoy, search for, and work all mines, minerals, and other rights and privileges in the said waste (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the act had not been made." This exception of the soil will probably be relied on for the defendant: but that refers to the ultimate allotment above alluded to. The commissioners, in making their award, seem to assume that the soil passes; for, in setting out the sheep-gates to the lord and to the several commoners, they profess in terms to award them "together with the ground and soil of the same."

[BYLES, J. The effect is to make them tenants in common.]

That could hardly have been the intention of the legislature. The general scope of the act of parliament, it is submitted, is, to leave the lord in the undisturbed possession of all his rights as he possessed them before: at all events until the final allotment amongst the proprietors of the several sheep-gates is made.

Mellish, Q.C. (*Quain* with him), for the defendant, was not called upon.

ERLE, C.J. I think the clear implication, if not the express words of the act, shews that the soil of the waste in question is

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no longer in the lord of the manor. The sections of the act referred to in paragraphs 6 and 11 of the special case, are those which appear to me to determine that. By the former it is provided that the commissioners shall set out and apportion in cattlegates for the lord one eighteenth part of the waste, in recompense and full satisfaction for his right and interest as lord of the manor, exclusive of such share thereof as he was entitled to in respect of his commonable messuages, &c. Now, his chief interest as lord of the manor would be his right to the soil of the waste. If there be any doubt that that is the meaning of the legislature, the matter is made still more clear by the provision set out in paragraph 11. It enacts that nothing in the act contained should be construed to defeat or prejudice the right or interest of the lord in the royalties, mines, and minerals under the waste by the act directed to be allotted and inclosed; but that he should hold and enjoy, search for, and work all such mines, minerals, and other rights and privileges in the said waste (*except the right to the soil thereof, for which a compensation was thereinbefore directed to be made*), in as ample and beneficial a manner as if the act had not been made. Reading these two provisions together, the effect seems to me to put an end to the lord's right to the soil of the waste, giving him compensation therefor, and saving his right to the mines and minerals.

BYLES, J. I am of the same opinion. In almost all inclosure acts, one main object is to put an end to the ownership of the soil in the lord. If any doubt could arise on the clause of the act referred to in the 6th paragraph of the case, the provision set out in the 11th paragraph makes it quite clear. The word "hereinbefore" can refer to nothing but the allotment mentioned in paragraph 6. The lord is to be compensated for all his interest.

KEATING, J. I am quite of the same opinion. It seems to me that the commissioners had power under the act to deal with the lord's rights in the soil of the waste, and that they have by their award done so. Even if the words were doubtful, it seems to me that we ought to pause before we adopted the argument of Mr. Manisty, because it is stated in the case (paragraph 23) that, "since the passing of the inclosure act and the execution of the

award, several of the proprietors to whom sheep-gates were awarded, have conveyed them to purchasers, *together with the ground and soil thereof*, by the usual modes of assurance." But it appears to me that the words are clear to take the soil out of the lord.

MONTAGUE SMITH, J. I am of the same opinion. Although there are some ambiguous phrases in the act, it is clear upon the whole that the soil was intended to be taken out of the lord. The only way in which this differs from ordinary inclosure acts, is, that, instead of at once allotting the waste lands amongst the persons entitled to rights of common, the provision is that the common rights shall still be enjoyed in a given manner. The clause (referred to in paragraph 10) for the future allotment of the stinted pasture is strong to shew that the allotment contemplated was to be of land belonging to the commoners: the land is to be divided into allotments "to and amongst the *proprietors* of the said common or waste ground, in proportion to *their respective rights and interest therein.*"

Judgment for the defendant. (1)

Attorneys for plaintiff: *Williamson, Hill, & Co.*

Attorney for defendant: *R. T. Jarvis.*

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THE NATIONAL DISCOUNT COMPANY (LIMITED) *v.* SAME.
OVEREND, GURNEY, & Co. (LIMITED) *v.* SAME.

May 8.

Railway Company, acceptance of bills of exchange by—Ultra vires—Pleading.

It is not competent to a company incorporated in the usual way for the formation and working of a railway, to draw, accept, or indorse bills of exchange: and the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors and under the common seal of the company.

THESE were actions brought by the respective plaintiffs against the defendants, a railway company, incorporated under the 22 & 23 Vict. c. lxiii., the 5th section of which prescribed the limit of their capital (170,000*l.*), and the 7th and 9th the mode

(1) See *Hilton* v. *Bowes*, Law Rep. 1 Q.B. 359.

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of raising it; the 37th and 38th impowered them to contract for working the traffic upon the railway, and the 1st section incorporated the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); but there was no provision in terms impowering them to draw, accept, or indorse bills of exchange or promissory notes.

The declaration in each case charged the company as the acceptors of several bills of exchange, drawn respectively by John Watson & Co., and purporting to be accepted in the following form:—"Accepted by order of the board of directors, and payable at the Agra and Masterman's Bank. John Wade, secretary," with the seal of the company annexed. It was proved (or admitted) in each case, that the company had actually commenced business as a railway company, and that there was a resolution of a board of directors authorizing the acceptance of the bills in question, as above.

Under the plea traversing the acceptance, it was contended on the part of the defendants, at the trial before Erle, C.J., at the sittings in London after last Hilary Term, that the company had no power by law to accept bills of exchange; and further, that, assuming that they had such power, the bills declared on were not accepted in such form as to be binding on them.

His Lordship directed verdicts to be entered for the plaintiffs in each action, reserving leave to the defendants to move to enter nonsuits if the Court should think the objections or either of them well founded.

Karslake, Q.C., on a former day obtained rules nisi accordingly. He referred to *Broughton* v. *Manchester Waterworks Company* (1), and *The Mayor of Ludlow* v. *Charlton* (2), and also to Byles on Bills (3), and Grant on Corporations. (4)

E. James, Q.C., and *Sir G. Honyman*, shewed cause on behalf of the plaintiffs in the first and second actions. The defendants are a company incorporated under an act of parliament, for the pur-

(1) 3 B. & A. 1.
(2) 6 M. & W. 815.
(3) 8th ed. 62.
(4) Ed. 1850, p. 276.

pose of trading as common carriers; and the sole question is, whether, as incident to the objects of their incorporation, they have power, like any other trading firm, to bind themselves by bills drawn upon them in the ordinary course of business. The rule is well stated in Story on Bills (1): "As to corporations, according to the old law, they could, generally (for there were always some admitted exceptions), contract only under their corporate seal. But the rule has been gradually relaxed and the exceptions enlarged, until, in our day, it may be taken to be a firmly-established rule in America, and admitted to a great extent in England, that corporations may contract and bind themselves by contracts not under seal, made through the instrumentality of their agents, and within the proper scope of the objects and purposes of their charter. But the question is more nice, as to the right of a corporation to become drawers, or indorsers, or acceptors of bills of exchange, or to become parties to any other negotiable paper. That an express authority is not indispensable to confer such a right, is admitted. It is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. Corporations are expressly mentioned in the statute of 3 & 4 Ann. c. 9, respecting promissory notes, as persons who may make and indorse negotiable notes, and to whom such notes may be made payable; and, as the statute gives the like remedy to and for corporations and others as upon inland bills of exchange, it implies that, by the custom of merchants, they may, in some cases at least, draw, indorse, accept, or sue upon bills of exchange. But, where drawing, indorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding upon the corporation." The rule is laid down in similar terms in Byles on Bills (2): "In general, a corporation can only contract by writing under their common seal. But to this rule there are exceptions; and among them is the power of issuing bills or notes enjoyed by a company incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this privilege." It will hardly be contended that this company cannot contract for the supply of coals or rolling-stock. If so, why should they not have the ordinary

(1) Section 79; ed. 1843, p. 94. (2) 8th ed. 62.

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powers of a trading co-partnership to pay for them? The case of *Broughton* v. *Manchester Waterworks Company* (1) was decided upon a ground which is altogether inapplicable at the present day. Abbott, C.J., Bayley, J., and Holroyd, J., rest their judgment upon the statutes passed for the protection of the Bank of England; but Best, J., relies upon the additional ground that the company, not being incorporated for the purposes of trade, could only bind themselves by deed. "When," he says, "a company like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of *Slark* v. *Highgate Archway Company* (2), the Court of Common Pleas seemed to think that, unless express authority was given by the act establishing the company to make promissory notes eo nomine, a corporation could not bind itself except by deed. Now, there is nothing in the act of parliament establishing this company which authorizes them to bind themselves except by deed. The company, too, was not created for the purposes of trade, but merely to carry on the business of supplying the inhabitants of a particular place with water. Now, it cannot be necessary, for this purpose, that they should become the makers of promissory notes, or the acceptors of bills of exchange. As, therefore, the nature of the business in which they are engaged does not raise a necessary implication that they should have the power to accept bills, and as no authority is expressly given by the act of parliament for that purpose, I am of opinion, on this latter ground also, that the action cannot be maintained."

[BYLES, J. The Highgate Archway Company were expressly authorized by the 6th section of their act of incorporation (52 Geo. 3, c. cxlvi.) to borrow money upon promissory notes under their common seal.]

East London Waterworks Company v. *Bailey* (3) is merely confirmatory of the doctrine of Best, J., in *Broughton* v. *Manchester Waterworks Company*. (1) The East India Company, as a company established for trading purposes, had, independently of any statute,

(1) 3 B. & A. 1. (2) 5 Taunt. 792. (3) 4 Bing. 283.

power to draw and accept bills: *Edie* v. *East India Company* (1); *Murray* v. *East India Company*. (2) That power was *recognised* and *regulated* by the 9 & 10 Wm. 3, c. 44, and 53 Geo. 3, c. 155, ss. 57, 58. That a company incorporated for trading purposes may bind themselves by a contract made in furtherance of their incorporation, though not under seal, was affirmed by the Court of Queen's Bench in *Henderson* v. *Australian Royal Mail Steam Navigation Company*. (3)

[BYLES, J. That was not the case of a negotiable instrument. There was no evidence of the purpose for which these bills were accepted.]

No objection on that score can be urged upon this rule. As to the other objection, that the bills were not accepted in such form as to be binding on the company, there is nothing in the 97th section of the 8 & 9 Vict. c. 16, to deprive a corporation of its common law right to contract under seal.

[KEATING, J. Has the 7 & 8 Vict. c. 85, s. 19 (4), been repealed?]

(1) 2 Burr. 1216.

(2) 5 B. & A. 204.

(3) 5 E. & B. 409; 24 L. J. (Q.B.) 322.

(4) That section recites that "many railway companies have borrowed money in a manner unauthorized by their acts of incorporation or other acts of parliament relating to the said companies, upon the security of loan notes or other instruments purporting to give a security for the repayment of the principal sums borrowed at certain dates, and for the payment of interest thereon in the meantime; and whereas such loan notes or other securities issued otherwise than under the provision of some act or acts of parliament have no validity, and it is expedient that the issue of such illegal securities should be stopped; but, such loan notes or other securities having been issued and received in good faith as between the borrower and lender, and for the most part for the lawful purpose of the undertaking, and in ignorance of their legal invalidity, it is expedient to confirm such as have been already issued:" and it then proceeds to enact, "that, from and after the passing of this act, any railway company issuing any loan note or other negotiable or assignable instrument purporting to bind the company as a legal security for money advanced to the said railway company otherwise than under the provisions of some act or acts of parliament authorizing the said railway company to raise such money and to issue such security, shall for every such offence forfeit to her Majesty a sum equal to the sum for which such loan note, or other instrument purports to be such security; provided that any company may renew any such loan note, or other instrument issued by them prior to the passing of this act for any period or periods not exceeding five years from the passing of this act."

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It has not; and it strongly supports the present argument. It seems to recognise the right of public companies to accept bills for the purposes of their undertaking. Carriers, which these defendants are, are traders subject to the bankrupt laws: 5 & 6 Vict. c. 122, s. 10. In Story on Partnership (1) it is said: "In the remarks which have been already made (s. 102) in respect to the power of each partner to bind the firm by bills of exchange, promissory notes, cheques, and other negotiable instruments, we are to understand that this doctrine is not applicable to all kinds of partnership, but is generally limited to partnerships in trade and commerce, for, in such cases, it is the usual course of mercantile transactions, and grows out of the general customs and laws of merchants, which is a part of the common law, and is recognised as such."

[BYLES, J. In no case has a corporation been successfully sued upon a bill of exchange or promissory note, except where it has been expressly incorporated for the purpose of issuing bills and notes, or express power to accept or make them is given by the act of incorporation.]

The case, no doubt, is one of the first impression, and must, therefore, be determined upon principle, rather than upon the authority of any decision.

Karslake, Q.C., and *Holland*, for the defendants. This is a company incorporated for the construction and working of a railway, with a limited capital and limited powers of borrowing money on certain securities. It is in no sense a trading company: and neither the special nor the general act gives the company power to draw or accept bills of exchange. In Byles on Bills (2) it is laid down that "without a special authority, express or implied, a corporation has no power to make, indorse, or accept bills or notes:" and this is fully borne out by *Broughton* v. *Manchester Waterworks Company* (3), *East London Waterworks Company* v. *Bailey* (4), and numerous other cases. There is a marked distinction between a company which by possibility may trade, and a company which is established for the purpose of trading. "Trading," properly speaking, has reference only to the buying

(1) Section 102 a., ed. 1849.
(2) 8th ed. p. 62.
(3) 3 B. & A. 1.
(4) 4 Bing. 283; 12 B. Moore, 532.

and selling of goods: see Johnson's, Webster's, and Richardson's dictionaries. The word "trade" has, as was observed by Willes, J., in *Harris* v. *Amery* (1), a more restricted meaning than "business." Primâ facie, a corporation can only contract by deed: *Ludlow (Mayor)* v. *Charlton* (2); and, even if it accept bills under its common seal, that will not make the instrument a deed: *Aggs* v. *Nicholson* (3); *Halford* v. *Cameron's Coalbrook, &c., Railway Company.* (4) Even a trading company cannot be bound by the acceptance and indorsement of bills of exchange, unless it be essential to the purposes for which they are formed that they should do so. This was so held, in the case of a mining company, in *Dickinson* v. *Valpy* (5), in the case of a cemetery company in *Steele* v. *Harmer* (6), in the case of a gas company in *Bramah* v. *Roberts* (7), in the case of a salt and alkali company in *Bult* v. *Morrell* (8), and in the case of a salvage company in *Thompson* v. *Universal Salvage Company.* (9) In *Slark* v. *Highgate Archway Company* (10), the company was expressly impowered by its act of incorporation (52 Geo. 3, c. cxlvi. s. 6) to raise money upon promissory notes. And in *Murray* v. *East India Company* (11) the decision proceeded upon the ground that the power of the company to draw and accept bills was expressly recognised by statute. Even a deed will not bind the company if it be ultrà vires: *South Yorkshire and River Dun Company* v. *Great Northern Railway Company* (12); *Chambers* v. *Manchester and Milford Railway Company.* (13) In *Burmester* v. *Norris* (14), it was held that a mining company could not exceed the borrowing powers conferred by its deed, even for the necessary purpose of working the mines. There is nothing in the act of parliament incorporating this company, or in the 97th section of the general act, 8 & 9 Vict. c. 16, to authorize them to bind the shareholders by accepting bills in any form: and, even if there were, these bills are not so framed

(1) Ante, pp. 148, 154.
(2) 6 M. & W. 815.
(3) 1 H. & N. 165; 25 L. J. (Ex.) 348.
(4) 16 Q.B. 442; 20 L.J. (Q.B.) 160.
(5) 10 B. & C. 128.
(6) 14 M. & W. 831.
(7) 3 Bing. N. C. 963.
(8) 12 Ad. & E. 745.
(9) 1 Exch. 694; 17 L. J. (N.S.) (Ex.) 118.
(10) 5 Taunt. 792.
(11) 5 B. & A. 204.
(12) 9 Ex. 55, 84; 22 L. J. (N.S.) (Ex.) 305.
(13) 5 B. & S. 588; 33 L. J. (Q.B.) 268.
(14) 6 Ex. 796; 21 L. J. (N.S.) (Ex.) 43.

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as to satisfy that section; they are not signed by two directors. These formalities must be strictly complied with: *Ernest* v. *Nicholls* (1); *Leominster Canal Company* v. *Shrewsbury and Hereford Railway Company* (2), per Wood, V.C.

Bovill, Q.C., and *Mathew*, shewed cause in the third case. There is nothing in the law merchant to prevent a corporation from accepting bills of exchange or making promissory notes: and the statute 3 & 4 Ann. c. 9, assumes that they may do so. There is no reason why the different guilds of the city of London should not issue their notes as the Goldsmiths' Company formerly did, unless it be the restrictions imposed by the Bank charter. (3) The language of Bayley, J., in *Broughton* v. *Manchester Waterworks Company* (4), seems to shew that there could be no objection to the drawing or accepting of bills by a corporation: and *Serrell* v. *Derbyshire Railway Company* (5) shews that a railway company may draw cheques.

[ERLE, C.J. The question is whether they can accept bills.]

Here is a contract properly authenticated under the seal of the company. It lies upon the defendants to shew some law or some state of things which deprives it of validity. In *Scottish North-Eastern Railway Company* v. *Stewart* (6), Lord Wensleydale says: "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or regulated expressly or by *necessary* implication *prohibit* such contract between the parties. Primâ facie, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided. This is the doctrine of ultrà vires, and is no doubt sound law, though the application of it to the point of each particular case has not always been satisfactory to my mind." There is no evidence of any borrowing of money upon bills here, so as to bring the case within the prohibition in 7 & 8 Vict. c. 85, s. 97, or within the principle laid down in *Chambers* v. *Manchester and Milford Rail-*

(1) 6 H. L. C. 401.

(2) 3 Kay & J. 654; 26 L. J. (Ch.) 764.

(3) See 21 Geo. 3, c. 60, s. 12.

(4) 3 B. & A. 1.

(5) 9 C. B. 811; 19 L. J. (N.S.) (C.P.) 371.

(6) 3 Macq. 382, 415.

way Company. (1) The creation of a corporation for a specific purpose gives it all the rights incident to a corporation, with a superadded duty to fulfil that specific purpose, but without restrictions other than those expressly or by necessary implication imposed by the legislature: per Erle, J., in *Bostock* v. *North Staffordshire Railway Company* (2): and the learned judge refers to a case of *East Anglian Railway Company* v. *Eastern Counties Railway Company.* (3) The important object for which this company was incorporated was the formation of a railway upon which they were to carry on the business of common carriers of passengers and goods for hire. They must buy engines and carriages and coals to work the traffic. Having contracted debts by so doing, what is there to prevent them from doing as other traders ordinarily do, viz. accepting bills of exchange for those debts? Then it is said that the defendants are not bound by these acceptances because they are not signed by two directors, and therefore the directions of the 97th section of the 8 & 9 Vict. c. 16, have not been complied with: and cases have been referred to in order to shew that those directions must be strictly complied with. Where, however, a statute confers a power, it usually prescribes in what manner it may or shall be exercised: but, where a contract is binding at common law, the legislature in prescribing these formalities does not mean to say that the contract shall not be binding unless they are precisely observed. It is an enabling, and not a disabling provision. In *Wilson* v. *West Hartlepool Harbour and Railway Company* (4), Lord Justice Turner, speaking of the 97th section, says: "The legislature has in this section pointed out modes in which the powers of directors to contract may lawfully be exercised, and has enacted that all contracts made according to those powers shall be binding and effectual; but it has not said that contracts made in other modes shall not be binding and effectual, where there is power so to make them."

Holland (*Karslake, Q.C.*, with him), contrà. The dictum of Lord Justice Turner in the case last cited has no application here. That was a question of specific performance: and it in no degree contravenes the judgment of Lord Campbell, C.J., in *Halford*

(1) 5 B. & S. 588; 33 L. J. (Q.B.) 268.
(2) 4 E & B. 798; 24 L. J. (Q.B.) 225.
(3) 11 C. B. 775; 21 L. J. (C.P.) 23.
(4) 34 L. J. (Ch.) 241, 250.

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v. *Cameron's Coalbrook, &c., Railway Company* (1), or that of Wood, V.C., in *Leominster Canal Company* v. *Shrewsbury and Hereford Railway Company.* (2) The distinction between ordinary trading corporations and corporations created for specific purposes is clearly pointed out in Lindley on Partnership. (3) "It is clearly settled," says the author, "that any member of an ordinary trading partnership can bind the firm by drawing, accepting, or indorsing promissory notes in its name." "With respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his co-partners by putting the name of the firm to a negotiable instrument, depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description. (4) In the absence of evidence shewing necessity or usage, the power has been denied to one of several mining adventurers (5), quarry-workers (6), farmers (7), solicitors." (8) The law is laid down in similar terms in Byles on Bills (9), and in Grant on Corporations. (10)

ERLE, C.J. These were actions by the indorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act of 22 & 23 Vict. c. lxiii. for the purpose of making and working a railway in Wales. The precise purposes for which they are incorporated, and the powers which are intrusted to them, are limited and defined by the special act and the provisions of the general acts incorporated therewith. I take it to be well established that a corporation established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its

(1) 16 Q. B. 442; 20 L.J. (Q.B.) 160.

(2) 3 Kay & J. 654; 26 L. J. (Ch.) 764.

(3) Vol. i. pp. 213, 214.

(4) *Dickinson* v. *Valpy*, 10 B. & C. 128.

(5) *Brown* v. *Byers*, 16 M. & W. 252.

(6) *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

(7) *Greenslade* v. *Dower*, 7 B. & C. 635.

(8) *Hedley* v. *Bainbridge*, 3 Q.B. 316; *Levy* v. *Pyne*, Car. & M. 453; *Harman* v. *Johnson*, 2 E. & B. 61, 3 Car. & K. 272.

(9) 8th ed. 62.

(10) 1st ed. 276.

incorporation. The question then is, whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad,—or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an indorsee, but in respect of the latter not. So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to three exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation: and these exceptions prove the rule. In *Slark* v. *Highgate Archway Company* (1), the company was impowered by its act of parliament to accept bills for the specific purpose: and in the cases of the Bank of England and the East India Company, the negotiation of bills and notes was within the very scope and object of their incorporation. In no other case that I am aware of has the liability of a corporation ever been enforced. In *Broughton* v. *Manchester Waterworks Company* (2), the doctrine I have stated is laid down in general terms: and Bayley, J., entertained a doubt whether the holder of a bill of exchange accepted by a corporation could sue the corporation without shewing that the acceptance was given for a purpose for which it was competent to the corporation to accept. That proposition derives much more force when applied to the case of a corporation created for a specific purpose, as we have judicial notice from the act of

(1) 5 Taunt. 792. (2) 3 B. & A. 1.

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parliament that this is. Upon both principle and authority, therefore, I am of opinion that the acceptances given by this company are not binding acceptances, and that the plea is established.

BYLES, J. These cases are of great importance, raising, as I believe they do for the first time, the precise question whether it is competent to a railway company to accept bills of exchange. No precedent has been cited in support of the affirmative: and I cannot but feel that, if we intimated any doubt upon the matter, the market would in a short time be inundated with acceptances by railway companies. Only three instances can be cited of the acceptance of negotiable instruments by corporations. The first is that of the Bank of England: but that establishment was incorporated for the very purpose,—its promissory notes and bank post bills forming a very large portion of the circulating medium of this country. The second is that of the East India Company: there, the authority to draw, accept, and indorse bills and notes, if not created, is at all events ratified and confirmed, by two acts of parliament, the 9 & 10 Wm. 3, c. 44, and 55 Geo. 3, c. 155. The third instance is that of *Slark* v. *Highgate Archway Company* (1), where the company had express authority to give bills. Excepting these, there is no authority to shew that a common law corporation can draw, accept, or indorse bills of exchange; and it seems to me that there would be more difficulty in the case of a corporation created by statute. It is clear from the language of Bayley, J., in *Broughton* v. *Manchester Waterworks Company* (2), that a company constituted for the construction and maintenance of waterworks could not issue bills of exchange. Therefore, even if we knew nothing more of this company than that it was formed for the purpose of constructing and working a railway, it is plain that it could have no power to accept bills. But we have before us in the statute 22 & 23 Vict. c. lxiii., and in the statutes incorporated therewith, the constitution of this company; and we see that it has power to construct and work the railway, with a limited and strictly-defined authority to raise money. It is true they may incur debts in the construction of the line and providing rolling stock. So, in *Broughton* v. *Manchester Waterworks Company* (2),

(1) 5 Taunt. 792. (2) 3 B. & A. 1.

the company might contract debts for the construction of their reservoirs and buildings, and for their pipes and mains, and the labour expended in laying them. It seems plain, therefore, that this company has no power to bind itself by accepting bills. In what manner, then, is that inability to be taken advantage of? It is suggested that this should have been done by demurrer: but it does not follow that the defence is not admissible under a plea denying the acceptance. It is said that the agents of the company placed the corporate seal upon these bills. It seems to me that the present plea properly raises the question whether or not they were agents for that purpose.

KEATING, J. Without going into the wider question adverted to by my Brother Byles, from whose observations I do not dissent, it seems to me that the simple question which we have to consider is, whether it is within the competency of this railway company to accept bills of exchange so as to bind its shareholders. I am of opinion that it is not: and I rest that opinion upon the act of parliament. The legislature has carefully limited the powers of the company as to borrowing money; and, though the general acts are referred to and incorporated therein, yet neither these nor the special act confers upon the company any power to accept bills of exchange. Without presuming to controvert the opinion expressed by Lord Justice Turner in *Wilson* v. *West Hartlepool Harbour and Railway Company* (1), still one would have expected that, if the legislature had intended to invest the company with such a power as this, such intention would have been found in express terms, either in the general or the special acts. It is said that the company must necessarily incur debts in the prosecution of the business of carriers: but it is one thing to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment. Such a power might lead to the difficulties suggested by my Lord, viz. that their acceptances would be void if ultrà vires, but valid if they were proved to have been given for goods supplied or work done. Upon the simple ground, therefore, that the legislature has not expressed an intention to intrust to this company the power to accept bills, I am of opinion

(1) 34 L. J. (Ch.) 241.

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that the acceptances in question are not binding upon them, and that the objection is open to them upon these pleadings.

MONTAGUE SMITH, J. I am of the same opinion. The plaintiffs are indorsees, and not immediate parties to these bills, and therefore cannot recover unless the bills are in their inception valid instruments. I am clearly of opinion that it was not within the competency of this company to accept bills. It is a company incorporated for the formation of a railway, with a limited capital and limited powers of borrowing money. If such a company had power to accept bills of exchange, the consequence would be either that they might bind themselves by acceptances to an unlimited extent, or there must in each case be an inquiry whether the bill was given for the payment of a just debt, or for a purpose not warranted by their incorporation. I think it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to shew that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or indorsing bills of exchange. The first object of a railway company is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the primary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling. In addition to the cases already referred to, there is the distinct authority of many eminent text-writers that a railway company cannot accept. I will refer to one considerable authority, the late J. W. Smith. In his treatise on Mercantile Law, after speaking of the disability of corporations in general to accept bills, he says (1): "However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts

(1) 7th ed. by Dowdeswell, pp. 105—6.

relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." No express power to accept is given to this company: nor is there, in my judgment, any necessary implication from the purposes for which it was created. For these reasons, I am of opinion that the rule in each of these actions should be made absolute.

Rules absolute to enter a nonsuit.

Attorneys for plaintiffs in the first and second actions: *Thomas & Hollams.*

Attorneys for plaintiffs in the third action: *Jones, Vallings, & Roberts.*

Attorney for defendants: *S. F. Noyes.*

SHEARS *v.* JACOB.

April 16.

Bill of sale—Affidavit—Residence and occupation of maker—Attesting witnesses—Joint-stock trading company.

It is competent to a company established for trading purposes to give a bill of sale as a security for goods sold to or work done for them.

An affidavit filed with a bill of sale so given, describing the company by its name, "The Glucose Sugar and Colouring Company," and stating the address of its principal office, is a sufficient compliance with the 1st section of the Bills of Sale Act, 17 & 18 Vict. c. 36.

A bill of sale was executed under the common seal of a trading company. Opposite the seal were the names of two of the directors, who purported to sign as directors. The secretary, who was called as a witness, stated that "it was usual to affix the seal in the presence of the board, and for two directors to *attest* it:"—

Held, that the directors signing as above were not "attesting witnesses" within the meaning of the Bills of Sale Act.

THIS was an interpleader issue directed for the purpose of trying the right to certain goods which had been seized under an execution against the Glucose Sugar and Colouring Company (Limited), at the suit of the now defendant.

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At the trial before Erle, C.J., at the sittings in Middlesex after last Hilary Term, the plaintiff rested his title upon a bill of sale which had been executed on behalf of the company on the 17th of August, 1865, and whereby all the machinery and effects upon their premises were assigned to him to secure a balance due for work done by him for the company.

The company was formed under a deed of association dated the 29th of December, 1863, in which the objects for which it was established were described to be:—1. The manufacture of glucose sugar, starch, and gum. 2. The manufacture of colouring matter from glucose sugar. 3. The purchase of patents granted to Alexandre Monbré for such manufactures. 4. The doing of all such matters and things as shall be incidental or auxiliary to the attainment of the above objects, or any or either of them, or that may appear to the company to be conducive thereto or expedient to be done or carried on in connection therewith. The more material articles of this deed were the following:

Art. 38. "The directors may from time to time, as in their judgment they may deem expedient, borrow for the purposes of the company, without any further authority than a resolution passed at a meeting of the board, any sum or sums of money, but so that the sums so raised shall not exceed in the aggregate at any one time the sum of 10,000*l.*; and the directors may, with the sanction of a general meeting, borrow any further sum or sums of money in such manner, upon such terms, and upon such security as such meeting shall determine."

Art. 39. "Any bond, mortgage, debenture, or security bearing the common seal of the company, and issued for valuable consideration, shall be binding and obligatory on the company, notwithstanding any irregularity touching the authority of the directors to issue the same."

Art. 41. "The directors at any meeting of the board may from time to time make, accept, indorse, and negotiate, or authorize any person on behalf of the company to accept, make, indorse, and negotiate bills of exchange and promissory notes of the company, for the purposes of and in the ordinary course of the business of the company."

Art. 78. "The directors may make such regulations for the use

and for the safe custody of the seal of the company, as they may from time to time think fit."

Art. 85. "The directors shall cause minutes to be made in books provided for the purpose—1, of all appointments of officers made by the directors; 2, of the names of the directors present at each meeting of directors and committee of directors; 3, of all resolutions and proceedings of the directors; 4, of all resolutions and proceedings of meetings of the company."

Art. 86. "Any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of the company, or of the directors, or of any committee of directors, shall be receivable in evidence without any further proof."

The plaintiff was a shareholder in the company.

The bill of sale was sealed with the common seal of the company, and opposite the seal appeared the names of two directors, and the counter-signature of the secretary, as follows:

(L.S.) "Edmund Vansittart Neale, "B. Price, } Directors.

"J. E. B. Curtis, Secretary."

The bill of sale was registered under the 17 & 18 Vict. c. 36; and the affidavit filed therewith, which was made by the secretary, stated that the deponent saw the bill of sale "sealed with the seal of the said Glucose Sugar and Colouring Company, and countersigned by Edmund Vansittart Neale and Bonamy Price, who are two of the directors of the said company, and whose signatures appear subscribed thereto; and that the said company has its principal office at No. 9, Booth Street, Spitalfields, in the county of Middlesex."

The secretary, who was called as a witness, stated that the company carried on the business of manufacturing sugar; that no regulation had been made by the directors as to the mode of using the common seal; but that it was usual to affix it in the presence of the board, and for two directors to *attest* it.

It was objected, on the part of the defendant, that it was not competent to the company to give a bill of sale, that the affidavit filed with the bill of sale did not contain "a description of the residence and occupation of the person (or company) making or giving the same," or of the "attesting witnesses to

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such bill of sale," as required by the 1st section of the 17 & 18 Vict. c. 36.

His lordship, reserving leave to the defendant to enter a nonsuit, directed a verdict for the plaintiff.

Huddleston, Q.C. (*J. O. Griffits* with him), moved accordingly. The deed of association of the company gave the directors no power to give an instrument of this sort as a security for work done. The 38th article merely enables them to borrow money upon security; and the 39th article cannot apply to the case of a security given to one who is himself a member of the association. Then, the affidavit filed with the bill of sale does not comply with the requirements of the statute. In the first place, there is no description of "the residence and occupation" of the persons giving it.

[KEATING, J. How do you suggest they should have been described?]

In accordance with the description of the company in the memorandum of association. In the next place, the residence and description of the attesting witnesses should have been given. A non-compliance with the statute in these respects is fatal. Otherwise the object of the statute, which was to facilitate inquiry into the nature of the transaction, would be altogether frustrated.

[BYLES, J. Are the parties whose names appear upon the bill of sale attesting witnesses? Do they not countersign merely as directors?]

Their names are placed opposite the seal, and the evidence of the secretary was distinct, that it was the practice to affix the seal in the presence of the board, and for two directors to *attest* it. Neale and Price, therefore, are persons attesting the sealing of the instrument.

[BYLES, J. Do the articles of association require the signature of two directors?]

They appear to be silent upon the subject, save that the 78th enables the directors to make regulations for the *use* and safe custody of the seal. What are the names of Neale and Price there for, unless, as the secretary said, for the purpose of attesting the sealing? And, if they are there as parties to the making of

the instrument, their description and occupation should have been given.

ERLE, C.J. I am of opinion that there should be no rule in this case. The first question presented is, whether the giving of this security by the directors was ultrà vires. This being a trading company, it seems to me that they had power to buy and sell and to contract for work to be done in the course of their business, and to give a bill of sale for such goods or work. Then it is said that there has been a failure to comply with the requirements of the Bills of Sale Act, 17 & 18 Vict. c. 36. The statute requires an affidavit containing a description of the "residence and occupation" of the person giving the bill of sale. I think the affidavit here filed does contain a sufficient description of the company and of its place of business. Any person requiring more information might obtain it at the place where articles of association of joint-stock companies are registered. The remaining objection is, that the affidavit contains no description of the residence and occupation of the attesting witnesses. If the persons whose names are placed opposite to the seal were really attesting witnesses, then undoubtedly the bill of sale would be void. But I think there is no pretence for saying that Neale and Price attested the making of this instrument. They have merely put their names to it for the purpose of authenticating the seal; and the countersigning by the secretary was in like manner a mere compliance with the ordinary form of affixing the seal of a joint-stock company to every document issued by them.

BYLES, J. I entirely agree with my Lord upon the first two points; but I have entertained some doubt as to the third. As, however, the 78th article of the memorandum of association enables the directors to make regulations for the use of the seal of the company, and these two persons call themselves directors, and are not described as witnesses, I think we may consistently ascribe their signature to some general direction or course of business under that rule.

KEATING, J. I am of the same opinion. It is clear that these two gentlemen put their names to the document as directors only, and not as attesting witnesses.

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MONTAGUE SMITH, J. I entirely agree. The two directors sign as directors, and the secretary countersigns in the customary manner. Neither of them are attesting witnesses within the meaning of the Bills of Sale Act.

Rule refused.

Attorneys for plaintiff: *Vandercom & Co.*
Attorney for defendant: *G. Henderson.*

April 23.

HARRISON *v.* SEYMOUR.

Principal and surety—Discharge of surety by alteration in the contract—Bond, divisibility of condition.

Where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other.

By agreement between the plaintiff and S., the plaintiff agreed to purchase of S. the ship *Devonport*, the price being a sum of money and the transfer to S. of the plaintiff's ship the *Lord Dalhousie*. The plaintiff also agreed to lend S. 6000*l*. on mortgage of the *Lord Dalhousie*; and S. agreed to repair her, so as to class her eight years A 1 at Lloyd's; and also to do anything remaining to be done to the *Devonport* within two weeks after that ship's arrival in London. The defendant, as surety for S., gave his bond to the plaintiff, conditioned to be void if S. forthwith repaired the *Lord Dalhousie*, and if S., within the two weeks mentioned, did all that remained to be done to the *Devonport*. The plaintiff and S. afterwards, without the knowledge of the defendant, made another agreement, whereby the time within which the *Devonport* was to be completed was shortened, and more was to be done to her than was included in the original agreement:—

Held, that the conditions in the bond as to the *Lord Dalhousie* and the *Devonport* were separate and distinct; and that the defendant, though released (by the alteration made by the second agreement in the terms of the first) from his liability so far as related to the completion of the *Devonport*, was not released from his liability in respect of the *Lord Dalhousie*.

THE declaration stated that the defendant, by his bond sealed with his seal, and bearing date the 29th of March, 1865, became bound to the plaintiff in the sum of 600*l*., to be paid by the defendant to the plaintiff subject to a condition thereunder written, whereby, after reciting that, by agreement between the plaintiff of the one part and John Smurthwaite of the other part, the plaintiff agreed to purchase a ship called the *Devonport*

from the said John Smurthwaite, and the price for such ship was the transfer by the plaintiff to John Smurthwaite of a ship of the plaintiff called the *Lord Dalhousie* and the payment to John Smurthwaite of a sum of money; and that by the said agreement the plaintiff agreed, upon the delivery to him of the *Devonport*, to lend to John Smurthwaite 6000*l.* on mortgage of the *Lord Dalhousie;* and John Smurthwaite agreed that he would at his own expense repair and restore the *Lord Dalhousie* so as to class her, and to class her, eight years A 1 at Lloyd's; and John Smurthwaite also agreed, as an additional security, that he would forthwith so repair and restore the said ship, to give a satisfactory security to the plaintiff by the defendant; and that it was thereby further agreed that the plaintiff should have the option of settling for the *Devonport*, whether complete or not, at any time after a week from the date of the said agreement, and that anything then remaining to be done and supplied to the said ship according to the said contract and the specification therein mentioned, should be done and supplied in London, by and at the expense of John Smurthwaite, within two weeks after the ship's arrival in London; and that John Smurthwaite thereby agreed to give the plaintiff a satisfactory guarantee by the defendant to that effect; and, after further reciting that the defendant had agreed to enter into the said bond with such defeazance as thereinafter contained,—it was conditioned and provided, that, if John Smurthwaite should forthwith at his own expense restore and repair the *Lord Dalhousie* so that she should be entitled, according to the rules of Lloyd's registry, to be classed eight years A 1, and if the ship should within three calendar months from the date of the bond be classed eight years A 1 at Lloyd's, and if John Smurthwaite should at his own expense, within two weeks after the arrival of the *Devonport* in the port of London, do and supply all such matters and things as according to the said recited contract and the specification therein mentioned should remain to be done and supplied upon the settlement for the *Devonport*, then the bond should be void, but should otherwise be and remain in full force and virtue: First breach, that John Smurthwaite did not forthwith at his own expense restore and repair the *Lord Dalhousie* so that she should be or was entitled, according to the rules of Lloyd's registry,

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to be classed eight years A 1, but therein made default, contrary to the terms of the said condition: Second breach, that the *Lord Dalhousie* was not within three calendar months from the date of the bond (which period had elapsed before action brought) classed eight years A 1 at Lloyd's: Third breach, that although the *Devonport* arrived in the port of London, and although upon the settlement for the said ship as aforesaid, there remained, according to the contract and the specification therein mentioned, divers matters and articles to be done and supplied by John Smurthwaite; yet he did not at his own expense, within two weeks after the arrival of the *Devonport* in the port of London (which period had elapsed before action brought), do and supply all such matters and things as aforesaid, or any of them, but therein failed and made default, contrary to the terms of the said condition.

The defendant traversed the several breaches, and also pleaded,—

Fourthly, for defence on equitable grounds, that the defendant entered into the bond and condition in the declaration mentioned as surety only for John Smurthwaite; and that afterwards and before the arrival of the ship *Devonport* in the port of London, and before the expiration of the said three calendar months in the condition mentioned, the plaintiff and Smurthwaite, together with one Young, entered into another agreement, dated the 20th of April, 1865, without the knowledge, privity, or consent of the defendant, which last mentioned agreement the plaintiff then, without the knowledge, privity, or consent of the defendant, accepted and received from Smurthwaite in lieu of and in substitution for, and in accord and satisfaction of, so much of the agreement dated the 22nd of March, 1865, in the declaration mentioned, as related to the ship *Devonport*. Issue.

Demurrer, the grounds stated in the margin being, "that the plea is bad for not shewing that time was given to Smurthwaite by the new agreement or that the terms were thereby varied, so as to discharge the defendant; that the plea does not shew that the new agreement was intended to supersede the original one; and that the plea is pleaded to the whole declaration, and shews no answer to the breaches assigned as to the ship *Lord Dalhousie*, and, being bad in part, is bad altogether." Joinder.

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The issues of fact were tried before Erle, C.J., at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence. One Smurthwaite, a ship-builder at Sunderland, was possessed of a ship recently built, called the *Devonport*, and the plaintiff, who was the owner of a ship called the *Lord Dalhousie*, being desirous of purchasing the *Devonport*, the parties entered into negotiations, which resulted in the following agreement:

"Memorandum of agreement made this 22nd day of March, 1865, between John Smurthwaite and T. O. Harrison, witnesseth that Smurthwaite agrees to buy and take over from Harrison the ship *Lord Dalhousie* as she now lies in Birkenhead Float, and all her stores, &c., and Smurthwaite agrees to sell and deliver over to Harrison in the South Dock, Sunderland, the new ship *Devonport*, classed A 1 at Lloyd's, yellow metalled, fitted and complete for sea, with first-class East India outfit, according to inventory annexed; in consideration of which purchase and the said sale and delivery by Smurthwaite to Harrison, he, Harrison, agrees to pay Smurthwaite, on his delivery over to him of the ship *Devonport*, 14,750*l.*, of which 9000*l.* is to be paid in cash and 5750*l.* in Harrison's acceptance at six months' date, which Harrison agrees to discount or get discounted at the minimum Bank of England rate, as difference of balance of purchase money between the two ships: And, further, Smurthwaite hereby promises and agrees at his own expense to repair and restore and re-metal the *Lord Dalhousie* so as to class her, and to class her, eight years A 1 at Lloyd's, and also undertakes, as an additional security, that he will forthwith so repair and restore the said ship, to give a satisfactory guarantee to Harrison, by Messrs. Seymour, Peacock, & Co. of London, to such effect: And Harrison hereby agrees, on the delivery over to him of the *Devonport*, fitted and completed as aforesaid, to lend Smurthwaite 6000*l.* on mortgage to Harrison of the *Lord Dalhousie*, &c.: Should Messrs. Seymour, Peacock, & Co. refuse to give Harrison a satisfactory guarantee as before stated within twenty-four hours of Harrison's applying for same, the agreement to be null and void: The *Devonport*, herein referred to, is guaranteed to be at least 1200 tons below deck, and including the poop, register tonnage; but, if she should be

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short of that, for every ton short the seller engages to allow and pay the purchaser at the rate of 15*l.* per ton: The purchaser of the *Devonport* to have the option of settling for the ship, whether complete or not, at any time after a week from this date; and anything required by the within contract and specification not then done and supplied, to be done and supplied in London at the seller's expense *within two weeks after arrival in London:* And Smurthwaite engages to give Harrison a satisfactory guarantee by Messrs. Seymour, Peacock, & Co., to such effect," &c.

On the 29th of March, 1865, the defendant (who traded under the name of Seymour, Peacock, & Co.), executed the bond declared on. Smurthwaite not having completed the *Devonport,* it was agreed that she should be delivered to Harrison in an incomplete state, and that he should retain 940*l.* 12*s.* 6*d.* towards making good what was left unfinished; and on the 10th of April, 1865, the defendant addressed the following letter to the plaintiff:

"Dear Sir,—With reference to the contract for the purchase by you of the ship *Devonport,* we understand it is proposed to make a settlement with you in the meantime by leaving a small sum in your hands until the ship is finally finished: and, in the event of you so making a settlement in account, we hereby undertake that our guarantee shall remain in force, notwithstanding such a mode of settlement."

The second agreement, which was dated the 20th of April, 1865, was as follows:

"Memorandum, &c., between John Smurthwaite of the first part, T. O. Harrison of the second part, and W. J. Young (1) of the third part: Whereas, by agreement bearing date the 22nd of March, 1865, between Smurthwaite and Harrison, Smurthwaite agreed to sell and deliver over to Harrison, in the South Dock, Sunderland, the new ship *Devonport,* classed thirteen years A 1 at Lloyd's, &c.; in consideration of which purchase and sale by Smurthwaite to Harrison, Harrison agreed to pay to Smurthwaite, on delivery over to him of the said ship complete as aforesaid, the sum of 14,750*l.*, of which 9000*l.* was to be in cash and 5750*l.* by Harrison's acceptance at six months' date, which Harrison agreed

(1) Who represented certain mortgagees of Smurthwaite's interest.

to discount at the minimum Bank of England rate, and also by transferring to Smurthwaite a ship called the *Lord Dalhousie*: And whereas Smurthwaite has not completed the outfit of the ship *Devonport* pursuant to the said agreement: And whereas Smurthwaite has applied to and requested Harrison to pay him the sum of 19,500*l.* (1) on account of and in part payment of the amount agreed to be paid under and by virtue of the said agreement, which Harrison has agreed to do on Smurthwaite entering into the agreement and guarantee hereinafter contained: And whereas, in pursuance of the said agreement, and in consideration thereof, it has been agreed that 180*l.* should be deducted for short tonnage, and 129*l.* 7*s.* 6*d.* should be deducted from the purchase money for the discount referred to in the said agreement; and after payment of the 19,500*l.*, and deduction of 180*l.* and 129*l.* 7*s.* 6*d.*, there still remains in the hands of Harrison the sum of 940*l.* 12*s.* 6*d.*: And whereas it has been specially agreed, for certain considerations, that the said sum of 940*l.* 12*s.* 6*d.* shall be paid over on completion to the said W. J. Young: It is witnessed that, in consideration of the sum of 19,500*l.* in hand well and truly paid by Harrison to Smurthwaite, or to his order (the receipt of which sum Smurthwaite doth hereby admit and acknowledge), he Smurthwaite doth hereby undertake and agree fully and effectually, to the satisfaction of Harrison, to put into the South Dock, class, and complete, the said vessel and her outfit, according to contract, *on or before the 27th of April next*, and to carry out the aforesaid agreement in its full integrity: And it is hereby agreed by and between the said parties, that Harrison shall retain the said sum of 940*l.* 12*s.* 6*d.*, part and balance of the purchase money due in respect of the said ship, and payable on the completion of the ship, and on such completion Harrison shall pay the said sum of 940*l.* 12*s.* 6*d.*, being, with the said sums of 19,500*l.*, 180*l.*, and 129*l.* 7*s.* 6*d.*, already paid and agreed to be deducted, the full sum agreed to be paid by Harrison for and in respect of the said ship: And it is agreed that Harrison shall be paid by Smurthwaite interest

(1) The sum of 19,500*l.* is arrived at by adding to the purchase money of the *Devonport* (14,750*l.*) the 6000*l.* agreed to be lent on mortgage of the *Lord Dalhousie*, and deducting therefrom the aggregate of the three sums of 940*l.* 12*s.* 6*d.*, 180*l.*, and 129*l.* 7*s.* 6*d.*

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at the rate of 5*l.* per cent. per annum on the said sum of 19,500*l.* from this date until the said ship and outfit shall be fully completed: And it is hereby agreed that, if Smurthwaite shall neglect, omit, or refuse to complete the said vessel and her outfit according to the terms of the said agreement on or before the said 27th of April aforesaid, then it shall and may be lawful for Harrison, but not obligatory upon him, to do all that may be necessary to complete the said vessel and her outfit: And it is hereby agreed by the said parties that Harrison shall have the option of applying the said balance or sum of 940*l.* 12*s.* 6*d.* so remaining in his hands as aforesaid, or so much thereof as it shall or may be necessary so to do, in completing and finishing the said vessel and her outfit as aforesaid; and any further sum or sums of money over and above the said sum of 940*l.* 12*s.* 6*d.* which may be expended by Harrison in so doing, shall be a charge against Smurthwaite, his executors, &c., and payable by him on demand made by Harrison: And it is hereby further agreed that the several articles and things specified in the list appended hereto shall, with other things, be deemed to be necessary to the due completion of the said ship: And Smurthwaite doth hereby specially declare and agree that the receipt of Young for or in respect of any moneys paid to him by Harrison shall be a good, valid, and effectual discharge for the amount therein expressed to be received."

The arrangement as to the *Lord Dalhousie* was then carried out, the ship being conveyed to Smurthwaite by a statutory bargain and sale, professing to be in consideration of 6000*l.*: and on the same day Smurthwaite mortgaged her to Harrison for securing 6000*l.* Both these instruments were registered at the Custom House on the 24th of April, 1865. Smurthwaite became bankrupt in May, and no step had been taken towards having the *Lord Dalhousie* classed.

On the part of the defendant it was contended that the transaction in respect of which he became surety was so altered by the agreement of the 20th of April as to discharge him, it being impossible to sever the contract as to the *Lord Dalhousie* from that as to the *Devonport*.

The jury returned a verdict for the plaintiff, assessing the damages upon the first and second breaches, which related to the

Lord Dalhousie, at 1800*l.*, and as to the third breach, which related to the *Devonport*, at 1*s.*

J. Brown, Q.C., in Hilary Term, pursuant to leave reserved, obtained a rule nisi to enter a verdict for the defendant on the fourth issue, on the ground that the fourth plea was sustained by the evidence, and that the defendant was discharged from liability on the bond by the agreement of the 20th of April, 1865, at all events so far as related to the ship *Devonport*. He contended that the agreement of the 20th of April made a substantial alteration in the original contract of the 22nd of March, in respect of which the defendant consented to become surety, by altering the time for the completion of the *Devonport*, and otherwise, and that consequently he was released from his suretyship; the whole transaction being so inextricably mixed up together, that the two parts of it could not be severed.

Sir G. Honyman (*E. James, Q.C.*, with him) shewed cause against the rule, and supported the demurrer. The original transaction between the plaintiff and Smurthwaite was this:—Smurthwaite was possessed of an unfinished vessel called the *Devonport*. The plaintiff was the owner of an old vessel called the *Lord Dalhousie;* and, being desirous of purchasing the *Devonport*, he agreed with Smurthwaite to take her at the price of 14,750*l.* and the *Lord Dalhousie;* and it was further agreed that Smurthwaite should repair the *Lord Dalhousie*, and procure her to be classed A 1 at Lloyd's for eight years, and that, on that being done, the plaintiff should advance Smurthwaite 6000*l.* on mortgage of that vessel. The defendant guaranteed the performance by Smurthwaite of these two things. After the defendant had executed the bond, the *Devonport* not being completed, it was proposed to enter into a fresh arrangement, under which a portion of the purchase money for the *Devonport* should remain in the plaintiff's hands as a security for the fufilment of Smurthwaite's engagement as to that vessel: and this is communicated to the defendant, and he, by his letter of the 10th of April, assents to it. Then comes the agreement of the 20th of April, which is relied upon to support the fourth plea. That agreement relates entirely to the time and mode of completing the *Devonport*, as to which the jury have

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given only nominal damages, the substantial damages being assessed upon the first and second breaches, which relate to the *Lord Dalhousie*. The question is, whether the plea is a good one, and whether it is proved in point of fact. It is clearly no answer as to the *Lord Dalhousie*.

[ERLE, C. J. The true and only question is, whether the condition is divisible. If it be so, the defendant is released as to the *Devonport*, but not as to the *Lord Dalhousie*.]

Skillett v. *Fletcher* (1) is a distinct authority to shew that the condition is divisible. The bond is for the performance of two entirely distinct things. It is the same, in effect, as if each had been made the subject of a separate bond.

J. Brown, *Q.C.*, and *Hannen*, contrà. *Skillett* v. *Fletcher* (1) is a totally different case from this. There, the party held two distinct offices, that of collector of poor-rates, and that of collector of sewer-rates, his appointment to which took place at different times. The action was upon a bond conditioned for the performance by the collector of his duties in both capacities. The plea was that before breach an act was passed under which the party was appointed collector of main-drainage rates; and it was held to afford no answer to the defendant's liability for breaches of duty in the office of collector of poor-rates. Here, the transaction is from its nature an entire one. The two ships are so mixed up together that they cannot be separated: the taking over of the old ship was part of the consideration for the purchase of the new one. The second agreement was clearly an alteration of the surety's position without his consent. It varied the time for the completion of the *Devonport;* and by it Smurthwaite was not to have the balance of the purchase money of that vessel, or the 6000*l.* on mortgage of the *Lord Dalhousie*, until the vessel was completed. An agreement between the creditor and the principal debtor which varies in any degree the position of the surety discharges the latter: *Whitcher* v. *Hall.* (2) It may be conceded that the fourth plea is not well pleaded as an agreement for the substitution of the new for the old contract, as to the *Devonport*: but this may be cured by an amendment. (3)

(1) Ante, p. 217.

(2) 5 B. & C. 269.

(3) The amendment proposed was, to set out the first agreement, and aver

[ERLE, C.J. The new agreement was not entered into until after the defendant's letter of the 10th of April.]

That letter was not an assent on the defendant's part to Smurthwaite's being subjected to additional obligations.

Sir G. Honyman was heard in reply.

ERLE, C.J. I am of opinion that the plaintiff is entitled to our judgment. The action is brought against Seymour as surety for Smurthwaite; and it is clear that, if the contract of the principal has, without the assent of the surety, been altered, the latter is relieved from liability. By the bond the surety has, I think, bound himself for the performance by Smurthwaite of two matters which are as entirely separate and distinct as if the defendant had become surety for the performance of one of them by one bond and of the other by another bond, in which case any alteration in the position of the principal in relation to the subject-matter of the one bond could hardly have been contended to affect the surety's liability as to the subject-matter of the other bond. The transaction out of which the question arises is somewhat complicated; but, if we separate the parts of the bond which relate to the one vessel from those which relate to the other, all difficulty, as it seems to me, will be removed. The condition of the bond is, that, if Smurthwaite should forthwith at his own expense restore and repair the *Lord Dalhousie* so that she should be entitled according to the rules of Lloyd's registry to be classed eight years A 1, and if the said ship should within three calendar months from the date of the bond be classed eight years A 1 at Lloyd's, and if Smurthwaite should at his own expense, within two weeks after the arrival of the ship *Devonport* in the port of London, do and supply all such matters and things as according to the recited contract and specification should remain to be done and supplied upon the settlement for the said ship *Devonport*, the bond was to be void. These two,—the repairing and classing of the one vessel, and the completing of the other,—are totally distinct and independent matters. Such being the contract for the due performance of which the defendant became

that after the making of that agreement the plaintiff and Smurthwaite, without the consent of the defendant, entered into a new agreement, setting it out.

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surety, the plaintiff and Smurthwaite afterwards agreed to vary the contract as to the *Devonport* in certain particulars; the time for the completion of the ship being shortened, and the fitting and finishing being of a more expensive character from that before stipulated for. By this variation of the contract, the defendant was relieved from all liability as surety so far as it related to the *Devonport*. But that leaves his responsibility as to the *Lord Dalhousie* just as it was before; and it is for that the jury have given the damages we are now considering. Some complication has arisen from the several sums being mixed up together in a manner which is not very intelligible. But, as the whole of the purchase money for the *Devonport* was paid before the second agreement was entered into, except 940*l.* 14*s.* 6*d.*, there was no alteration of the defendant's liability as surety which he could take advantage of. That sum was kept back by the licence of the defendant himself, as appears by his letter of the 10th of April. Upon the whole, I am of opinion that the plaintiff's right to enforce the bond against the surety, so far as regards the *Lord Dalhousie*, remains clear.

BYLES, J. Although I at first entertained some doubt, seeing the strictness which is required to fix a surety, I now entirely agree with my Lord. The retention by the plaintiff of the 940*l.* 12*s.* 6*d.* was fully justified by the defendant's letter of the 10th of April: and, further, I think the payment of that sum being postponed until the final completion of the *Devonport* was also justified by the same letter. As to the interest stipulated for by the second agreement, that was a mere compensation for pre-payment. I think the contract as to the two vessels was so far divisible that the plaintiff is entitled to retain his verdict for the damages which the jury have assessed in respect of the *Lord Dalhousie*.

MONTAGUE SMITH, J. I am entirely of the same opinion. The bond declared on was conditioned for the performance by Smurthwaite of two separate things,—first, the repairing the *Lord Dalhousie* and procuring her to be classed eight years A 1 at Lloyd's,—secondly, the completion of the *Devonport* within two weeks after her arrival in the port of London. I think the repairing and classing of the former vessel was separable from

the parts of the contract which related to the latter vessel, and that the subsequent alteration of the contract as to the one cannot in any way affect the defendant's liability as surety in respect of the other. The fourth plea, as now framed, is scarcely an answer as to the *Lord Dalhousie*. Indeed that was conceded by Mr. Brown. And it is also admitted that the plea was not proved as an accord and satisfaction. The decision of the Court, however, proceeds upon the whole facts of the case, and not upon the form of the pleadings; and I merely make this observation in order to shew that the demurrer has not been overlooked.

Rule discharged, and judgment for the plaintiff on the demurrer to the fourth plea.

Attorneys for plaintiff: *Waltons & Bubb.*
Attorneys for defendant: *Elmslie, Forsyth, & Sedgwick.*

ENGLAND *v.* MARSDEN.

April 23.

Money paid.

The plaintiff under a bill of sale seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord having distrained them, the plaintiff paid the rent and expenses:—

Held, that this was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request.

Exall v. *Partridge* (8 T. R. 308) distinguished.

THIS was an action for money lent, money paid, interest, and money due upon accounts stated.

First plea, never indebted.

The cause was tried before Montague Smith, J., at the sittings in Middlesex after last Michaelmas Term. The facts material to the present question were as follows:—On the 2nd of June, 1860, the defendant, in consideration of a past debt of 100*l.*, and a present advance of 80*l.*, by bill of sale assigned to the plaintiff all the household furniture, goods, &c., upon the messuage and premises known as the Gospel Oak, Circus Road, Kentish Town, subject to

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redemption on payment of the 180*l.* by weekly instalments of 3*l.* 10*s.* each; the whole to become due upon default in payment of any one weekly instalment, and the plaintiff to be at liberty in that event to take possession and sell the goods, &c. On the 9th of July, 1860, the defendant was arrested, and he afterwards obtained his discharge under the Insolvent Debtors Act, 1 & 2 Vict. c. 110. On the 10th of July, 1860, the plaintiff took possession under the bill of sale, but allowed the goods to remain upon the premises, and the defendant's wife and family to reside there and carry on the business until the 23rd of October, when the landlord distrained for a quarter's rent which became due on the 29th of September. On the 26th of October the plaintiff paid the quarter's rent and 6*l.* 9*s.* for expenses, which sums (amongst others) he now sought to recover from the defendant in this action as a payment made to release his goods from a claim for which the defendant was legally responsible.

In answer to a question put to them by the learned judge, the jury found that the plaintiff had no express authority from the defendant to keep the goods upon the premises; and, under his direction, a verdict was found for the plaintiff for 8*l.* 4*s.* 6*d.*, and leave was reserved to him to move to increase it by the sum of 42*l.* 9*s.*

Montagu Chambers, Q.C., accordingly obtained a rule nisi, relying upon the case of *Exall* v. *Partridge.* (1)

H. T. Cole shewed cause. The payment of the 42*l.* 9*s.* was a voluntary payment by the plaintiff to relieve his goods from a burthen brought upon them by his own act. It was not a payment made at the request, express or implied, of the defendant, or in any way for the defendant's benefit. Having taken possession of the goods under the bill of sale, the plaintiff had no right to leave them upon the premises, and so subject them to the landlord's claim for the accruing rent. *Exall* v. *Partridge* (1) was a totally different case: there, the plaintiff's carriage was left upon the defendant's premises at his request, and the law would imply a promise on his part to indemnify the plaintiff against the payment necessarily made to release it from the landlord's claim. It

(1) 8 T. R. 308.

was like the case of a payment by a lodger to a superior landlord who has seized the lodger's goods for rent due from his immediate tenant.

Montagu Chambers, Q.C., and *Butt*, in support of the rule. The goods, which by the seizure under the bill of sale had become the property of the plaintiff, having been distrained for rent which was legally payable by the defendant, the payment by the plaintiff was a compulsory payment for the defendant's benefit, and the law will imply a promise on his part to repay it. The case falls clearly within the principle of *Exall* v. *Partridge* (1), which was recognised in *Rodgers* v. *Maw* (2), and has been repeatedly acted upon. The plaintiff's position differs in no degree from that of the lodger who has paid money to the superior landlord in order to discharge his goods from a distress for rent due from his immediate landlord.

[MONTAGUE SMITH, J. The plaintiff kept the goods on the premises, not at the request of the defendant, or for the defendant's benefit, but in the hope of getting a better price for them in the event of a new tenant taking to them.]

The defendant never ceased to be tenant of the premises, and the goods clearly were left for his benefit, seeing that his wife and family remained there whilst he was in prison. He knew the goods were there and did not object to their remaining. It was obviously a payment for his benefit.

ERLE, C.J. I am of opinion that this rule should be discharged. The facts are these:—The plaintiff having, on the 10th of July, 1860, taken possession of certain goods in the defendant's house under a bill of sale, allowed them to remain upon the premises until after the 29th of September, on which day a quarter's rent became due. The landlord afterwards distrained for the rent, and the plaintiff freed his goods from that distress by payment of the sum claimed, and now seeks to recover it back from the defendant as money paid for his benefit and at his request. The proposition which has been contended for on the part of the plaintiff is, that, where the owner of goods places them upon the premises of another, and rent becomes due, and the land-

(1) 8 T. R. 308. (2) 15 M. & W. 444.

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lord distrains the goods, and the owner pays the landlord's claim in order to release his goods, the payment so made is a payment made under compulsion of law, and may be recovered in an action against the tenant; and for this *Exall* v. *Partridge* (1) is relied on. There is, however, one great distinction between that case and this. There, Partridge was a coachmaker, and Exall at his request bailed his carriage with him. The landlord distrained it for rent, and Exall cleared it from that burthen by paying the sum claimed; and it was held that the action lay, because the carriage was left upon the defendant's premises at the defendant's request and for his benefit. Here, however, the plaintiff's goods were upon the defendant's premises for the benefit of the owner of the goods, and without any request of the defendant. The plaintiff having seized the goods under the bill of sale, they were his absolute property. He had a right to take them away; indeed it was his duty to take them away. He probably left them on the premises for his own purposes, in order that he might sell them to more advantage. At all events, they were not left there at the request or for the benefit of the defendant. It is to my mind precisely the same as if he had placed the goods upon the defendant's premises without the defendant's leave, and the landlord had come in and distrained them.

BYLES, J. I am of the same opinion. The case is clearly distinguishable from *Exall* v. *Partridge* (1), which has been recognised often. As I collect the facts, the payment was exclusively for the advantage of the plaintiff, and in no degree for that of the defendant. There is no evidence of any request on the defendant's part. The leaving the goods upon the premises was the plaintiff's own act, for his own advantage. There is nothing from which the law can imply a promise to pay.

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KEATING, J. I am of the same opinion. The case of *Exall* v. *Partridge* (1), which is plainly distinguishable from this, is an illustration of the rule of law, that, where one man is compelled to pay a debt for which another is legally responsible, the law will imply a promise by the latter to indemnify the former. But here the plaintiff was not compelled to pay the rent within the

(1) 8 T. R. 308.

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meaning of that rule, because he voluntarily and for his own advantage allowed the goods to remain upon the premises whilst the rent was accruing. We do not, therefore, in any degree, impugn the rule which has been referred to.

MONTAGUE SMITH, J. I am of the same opinion. The facts obviously distinguish this case from *Exall* v. *Partridge*. (1) The plaintiff by his own voluntary act, and without any request of the defendant, express or implied, placed his goods in a position to enable the landlord to seize them. He probably thought it would be more to his own advantage if he allowed the goods to remain upon the premises until a new tenant was obtained, inasmuch as they would in that case command a better price. He was not ignorant of the accruing claim of the landlord. The jury found that he had no express authority from the defendant to leave the goods on the premises. If the defendant had been asked, in all probability he would have declined to give such authority. This, moreover, is a very stale claim.

Rule discharged.

Attorneys for plaintiff: *Walker & Twyford.*
Attorneys for defendant: *Langley & Gibbons.*

RE EDGE.

May 7.

Acknowledgment by married woman under 3 & 4 Wm. 4, c. 74—Filing certificate and affidavit of verification nunc pro tunc.

The Court allowed a certificate of acknowledgment and affidavit verifying the same to be received and filed by the proper officer under the 3 & 4 Wm. 4, c. 74, s. 84, after a lapse of six years,—upon an affidavit shewing that the failure to comply with the rule of H. T. 4 Wm. 4 arose from inadvertency, and upon being satisfied (by affidavit) that the property had been so dealt with in the interim that no one could be prejudiced thereby.

BY an indenture, dated the 13th of March, 1860, which was a post-nuptial settlement in pursuance of an agreement made before marriage, certain property of the wife, Mrs. Edge, at Biddulph, in the county of Stafford, was conveyed to trustees, in trust for her

(1) 8 T. R. 308.

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sole use during her life, and, after her decease, to the use of Elizabeth Stanway and Josephus Pickford, her two children by a former husband, their heirs and assigns for ever, as tenants in common.

An acknowledgment by Mrs. Edge was duly made and certified, and an affidavit of verification ingrossed, on the day of the date of the deed; but the affidavit was not sworn or the documents filed pursuant to the rule of Hilary Term, 4 Wm. 4, which provides "that the certificates and affidavits verifying the same shall, *within one month from the making the acknowledgment*, be delivered to the proper officer appointed under the said act (1), and that the officer shall not after that time receive the same without the direction of the Court or a judge."

The property had been mortgaged for securing the sum of 60*l.* and interest, and this mortgage had by transfer become vested in Messrs. E. & A. Tennant, who, on the 5th of October, 1865, obtained from Josephus Pickford, a conveyance of the equity of redemption. In order to perfect the title, Messrs. Tennant then applied to Mr. Latham, the solicitor by whom the documents had been prepared, for an office-copy of the certificate of acknowledgment, when that gentleman discovered for the first time that the certificate and affidavit had not been filed.

Upon an affidavit by Mr. Latham stating these facts, and explaining that the nonobservance of the rule of court was occasioned by the fact of his papers having about the time the acknowledgment was taken been removed to new offices, and the clerk who had the management of the particular business having left his service, and that it was quite unintentional on his part,

C. Pollock moved that the certificate and affidavit might be received and filed by the proper officer, notwithstanding the lapse of time. A similar application had been made to Keating, J., at chambers, but he declined to make an order. He referred to an unreported case of *Re Walker*, where an acknowledgment had been taken in 1836, and the Court in 1862 allowed it to be filed, the delay being accounted for by reason of the certificate having been accidentally put away with the title-deeds and forgotten, and the

(1) 3 & 4 Wm. 4, c. 74, s. 84.

omission to file it having only been discovered when, by reason of a sale of the property, it was required for the purpose of perfecting the vendor's title.

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BYLES, J. It is not enough to shew an excuse for the neglect to comply with the rule, and the reason for requiring the documents now to be filed. The Court should be informed how the property has been dealt with in the interim, in order to see that no person interested in it can be prejudiced.

The required information having been supplied, the Court allowed the certificate and affidavit to be received and filed.

Rule accordingly.

Attorneys for applicant: *C. & C. R. Cuff.*

KIDSTON AND OTHERS *v.* THE EMPIRE MARINE INSURANCE COMPANY, LIMITED.

May 8.

Ship and shipping—Marine Insurance—Suing and labouring clause—"Particular average"—"Particular charges"—Warranty against particular average—Evidence of usage amongst underwriters.

The ship *Sebastopol*, of which the plaintiffs were owners, was chartered for a voyage from the Chincha Islands to the United Kingdom with a cargo of guano, at a freight payable on arrival at the port of discharge. The plaintiffs effected with the defendants a policy on the charter freight, which contained the usual suing and labouring clause and the following warranty,—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt." In the course of the voyage the vessel encountered a severe storm, and put into Rio, so damaged by perils of the sea as to be not worth repairing, and she was accordingly sold. The plaintiffs gave no notice of abandonment, but the guano having been landed and warehoused at Rio, the master procured another vessel, the *Caprice*, to carry it on to Bristol, for an agreed freight of 2467*l.* 11*s.* 10*d.* which the plaintiffs paid, receiving from the owners of the cargo the full charter freight. The master also incurred an expense of about 100*l.* in landing, warehousing, and reloading the guano at Rio:—

Held, that the plaintiffs were entitled to recover from the defendants, under the suing and labouring clause, the expenses so incurred and the freight of the *Caprice*, notwithstanding there had been no abandonment.

Held, also, that evidence was admissible to shew that, by the usage amongst underwriters, the term "particular average" does not include expenses which are necessarily incurred in order to save the subject-matter of insurance from a loss

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for which the insurers would have been liable, and that these are usually allowed under the name of "particular charges."

Held, also, that, the occasion upon which these particular charges were incurred being such as to be within the suing and labouring clause, the application of that clause was not excluded by the warranty against particular average.

Affd in Exch 2 C.P. 358.

THIS was an action to recover 1145*l.* 3*s.* 6*d.* upon a policy of insurance effected in the sum of 2000*l.*, by the plaintiffs, with the Empire Marine Insurance Company, on charter freight, valued at 5000*l.*

The declaration contained a count on the policy, and the common money counts. The only material claims in the declaration were,—first, a claim of the 2000*l.* insured, on the ground of the total loss of the charter freight,—secondly, a claim, under the suing and labouring clause of the policy, for the charges and expenses incurred by the plaintiffs by reason of the plaintiffs, their factors, servants, and assigns, suing, labouring, and travelling in and about the defence, safeguard, and recovery of the subject-matter of the insurance,—thirdly, a claim for money paid to the defendants' use.

The defendants pleaded to the first claim that the ship was not stranded, sunk, or burnt, and that the loss was a particular average loss: to the second claim—first, that the charges and expenses so incurred as aforesaid constituted and were only particular average losses, from which the subject-matter of the insurance was warranted free,—secondly, that a loss or misfortune did not arise within the true intent and meaning of the policy,—thirdly, that there was no suing, labouring, or travelling in and about the defence, safeguard, and recovery of the subject-matter of the insurance, within the true intent and meaning of the policy. To the common counts, never indebted.

The plaintiffs joined issue on the several pleas, and also demurred to the plea which set up that the charges were particular average losses.

The cause was tried before Erle, C.J., at the London sittings after Michaelmas Term last, when it appeared that the plaintiffs, shipowners at Glasgow, were owners of the ship *Sebastopol*; and the defendants were an insurance company carrying on business at Liverpool.

On the 16th of March, 1863, the plaintiffs chartered the *Sebastopol* to Messrs. Thomson & Co., by a charterparty, according to the provisions of which the ship was to proceed to the Chincha Islands, there to load a cargo of guano, and thence to proceed therewith to the United Kingdom, for the stipulated freight of 75*s.* sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam; such freight to be paid as follows, viz. 1000*l.* in cash on arrival at port of discharge, three months' interest at the rate of 5 per cent. being deducted, and the belance forty-eight hours after the true and right delivery of the whole cargo.

On the 18th of August, 1863, the plaintiffs effected with the defendants the policy in question, being a policy of insurance in the sum of 2000*l.*, by the *Sebastopol*, on charter freight valued at 5000*l.*, warranted free from particular average, also from jettison, unless the ship were stranded, sunk, or burnt; the voyage insured by the said policy covering the aforesaid chartered voyage to the Chincha Islands and thence to the United Kingdom. The policy also contained the usual suing and labouring clause.

The *Sebastopol* sailed for the Chincha Islands, and there loaded a cargo of guano, with which she sailed for Cork; but, in the course of the voyage, she was compelled by stress of weather to put into Rio Janeiro, where she arrived on the 7th of February, 1864.

On her arrival at Rio, the cargo of guano was discharged and properly stored and warehoused; and on being surveyed, she was found to have been so damaged by the perils of the seas as not to be worth repairing. She was therefore sold by the master at Rio on the 31st of March, 1864; the sale being in all respects proper and necessary, and the ship herself being then a total loss.

On the 12th of March, 1864, the master of the *Sebastopol* chartered the ship *Caprice*, at a freight of 37*s.* 6*d.* per ton, for the purpose of bringing the cargo of guano from Rio to the United Kingdom, and delivering it to its owners. The charterparty was made at Rio, and purported to be made between E. S. Harkey, master of the *Caprice*, and Duncan Taylor (on behalf of owners), master of the *Sebastopol*, and was signed E. S. Harkey and Duncan

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Taylor. The cargo was accordingly taken from the warehouses where it had been stored and warehoused at Rio, and loaded on board the *Caprice*, and conveyed by that ship to Bristol, and there duly delivered to Messrs. Thomson & Co. the owners of the cargo. The plaintiffs paid to the owners of the *Caprice* 2467*l.* 11*s.* 10*d.*, which was the agreed freight payable to that vessel for carrying the cargo from Rio to Bristol.

Messrs. Thomson & Co., on delivery of the cargo, paid the charter freight of 5000*l.* in full to the plaintiffs, who did not pay the same or any part thereof to the defendants.

The plaintiffs did not give any notice of abandonment to the defendants.

The expenses incurred at Rio in discharging, warehousing, and transhipping the goods, together with the freight payable to the *Caprice*, amounted to about 3000*l.*

For the plaintiffs it was contended that they were entitled to recover from the underwriters the expenses incurred in conveying the guano to the *Caprice* from the warehouses at Rio, which were less than 100*l.*, and also the sum of 2467*l.* 11*s.* 10*d.*, paid by the plaintiffs to the owners of the *Caprice* for carrying the cargo from Rio to the United Kingdom.

For the defendants it was contended that they were not liable on the policy to repay to the plaintiffs any part of the said expenses, nor any part of the 2467*l.* 11*s.* 10*d.*

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At the trial several average-adjusters and other witnesses were called to prove the meaning of the term "particular average" in the business of marine insurance; and the jury found that, up to the time of the policy in question, there had been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriter to the term "particular average," as contradistinguished from the term "particular charges," in the manner described by the witnesses, viz. that "particular average" denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not "particular average," but are termed "particular charges."

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Upon this finding of the jury, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit.

Mellish, Q.C., in Hilary Term last, obtained a rule pursuant to the leave reserved, on the grounds,—first, that the charges in question were not within the clause in the policy respecting suing and labouring, and that no other part of the policy was applicable to the case,—secondly, that the custom alleged was a universal custom, and not a custom of any particular place or trade,—thirdly, that there was no evidence that the alleged custom prevailed in Liverpool at the time the policy was made.

E. James, Q.C., and *Sir G. Honyman*, shewed cause, and contended that the plaintiffs were entitled to recover, on three grounds,—first, that the loss was not a particular average loss, but a total loss with benefit of salvage,—secondly, that they were entitled to recover under the suing and labouring clause, without interfering with the rule laid down in *The Great India Peninsular Railway Company* v. *Saunders* (1) and *Booth* v. *Gair* (2), the money having been paid in order to avert a loss which would otherwise have fallen upon the underwriters,—thirdly, that the evidence of usage was legitimately introduced for the purpose of shewing that "particular average" has a well-known definite meaning as contradistinguished from "particular charges." They cited the following authorities: *Stewart* v. *Steele* (3); *Mount* v. *Harrison* (4); *Farnworth* v. *Hyde* (5); *Shipton* v. *Thornton* (6); *De Cuadra* v. *Swann* (7); *Vlierboom* v. *Chapman* (8); *Clayton* v. *Gregson* (9); *Gorrissen* v. *Perrin* (10); Phillips on Insurance (11); Arnould on Insurance (12); and Taylor on Evidence. (13)

Mellish, Q.C., and *Cohen*, in support of the rule, contended that

(1) 1 B. & S. 41; 30 L. J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.

(2) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

(3) 5 Scott N. R. 927.

(4) 4 Bing. 388.

(5) 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207.

(6) 9 A. & E. 314.

(7) 16 C. B. (N.S.) 772.

(8) 13 M. & W. 230.

(9) 5 A. & E. 302.

(10) 2 C. B. (N.S.) 681; 27 L. J. (C.P.) 29.

(11) Vol. ii. s. 1743.

(12) 3rd ed. by Maclachlan, vol. ii. p. 739, n.

(13) 4th ed. ss. 1059, 1060, 1062, 1063.

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there was no total loss of the freight either actual or constructive, the goods being capable of being carried to their destination and earning freight; that, upon this form of policy, the suing and labouring clause has no application unless there has been an abandonment and the expenses have been incurred in order to avert a total loss; that the loss here being partial, the expenses incurred constituted "particular average" only, and therefore were within the warranty; and that no usage could be set up which contradicted the written policy. They cited *Michael* v. *Gillespy* (1); *Philpott* v. *Swann* (2); *Hall* v. *Janson* (3); *The Great Indian Peninsular Railway Company* v. *Saunders* (4); *Booth* v. *Gair* (5); Emerigon (6); Benecke's Principles of Indemnity (7); Code de Commerce (8); Arnould on Insurance (9); Phillips on Insurance. (10)

Cur. adv. vult. (11)

The judgment of the Court (Erle, C.J., Willes, Keating, and Montague Smith, JJ.) was delivered by

WILLES, J. This was an action upon a policy of insurance for 2000*l.* from South America to the United Kingdom. The vessel procured a charter from the Chincha Islands to the United Kingdom, loaded a cargo of guano there, and on going round Cape Horn suffered damage so serious that she had to put into Rio, where she was abandoned, and, it must be taken for the purposes of this case, was totally lost. The cargo, however, was transhipped into another vessel and sent home, and the chartered freight, or an amount equivalent to the chartered freight, according to the construction to be put on the matter, exceeded the expense of transhipment, and the freight from Rio to ~~Liverpool~~ Bristol was received by the assured.

(1) 2 C. B. (N.S.) 627; 26 L. J. (C.P.) 306.

(2) 11 C. B. (N.S.) 270; 30 L. J. (C.P.) 358.

(3) 4 E. & B. 500; 24 L. J. (Q.B.) 97.

(4) 1 B. & S. 41; 30 L. J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.

(5) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

(6) Traité des Assurances, ch. 12, s. 39; ch. 17, s. 7.

(7) pp. 165, 166.

(8) Liv. ii. tit. 11, art. 403.

(9) 3rd ed. by Maclachlan, vol. ii. p. 824.

(10) Sections 1422, 1632.

(11) The argument of the demurrer was by arrangement taken with the rule.

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The action was brought by the assured to recover the expenses of transhipment and forwarding.

At the trial, evidence was given to shew that the warranty in the policy on which the question turned was not considered applicable to the circumstances. The warranty was, "free from particular average; also from jettison, unless the ship be stranded, sunk, or burned," neither of which happened.

The evidence given was for the purpose of shewing that the charges of transhipping and forwarding had been considered to be what was called technically "particular charges," and not particular average so as to be within the warranty. The verdict passed for the plaintiffs, affirming the existence of the usage at the time when the policy was made, subject to leave reserved to the defendants to move to enter a verdict, which they accordingly did; and that rule was discussed last term before the Chief Justice and my Brothers Keating, Montague Smith, and myself, when we took time to consider. At the sittings after term we discharged the rule, not stating our reasons, but promising to do so during this term; and that promise I am now about to fulfil.

Many points were made upon the argument of this rule; upon one of which only is it necessary to pronounce an opinion. That turned upon the construction of the suing and labouring clause in the policy; and it may be considered under the following heads, —first, whether the expenses incurred were of a character to be within the clause,—secondly, whether the occasion upon which they were incurred was such as to be within it,—thirdly, whether, if it was such, the application of the clause is excluded by the warranty against particular average.

As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. Without incurring them the subject-matter of the insurance never would have had any complete existence. They were incurred in order to earn it; and they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject-matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was

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bestowed. As the goods lay at Rio, no part of the chartered freight had accrued due, and no freight even pro ratâ itineris could have been claimed by the shipowner. His only right in respect of the charter freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and there claim an amount equal to that of the charter freight. In order to do so, labour must be used and expense incurred. It can make no difference whether the shipowner happen to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself or his servants, or whether he forwards in the vessel of another shipowner, paying for his labour and that of his servants. Nor can it make any difference, in the application of the clause, whether, as here, the goods are in a port of large resort, or where by reason of the rate of freight a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place, and by unusual enterprise and skill the master is enabled to communicate with a vessel either of his owner or of some other person by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases; but in each it is a consequence of a peril insured against; it is incurred in preventing the destruction or nonentity of the subject-matter for which in the event of its loss the underwriters must be answerable. There is in each case a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject-matter will be imperilled and the underwriters may become liable.

As to the second head,—whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause,—this depends upon the true answer to the question so thoroughly discussed in the course of the argument, viz. whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes, or may become, theirs, or whether it extends to every case in which the subject of insurance is ex-

posed to loss or damage for the consequences of which the underwriters would be answerable, and in warding off which labour is expended. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution.

The question manifestly depends upon the construction of the language of the clause; and, quite apart from the proved usage, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment upon which we need only say in passing that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on insurance, in which amongst the various forms of the clause used at different ports, that of the London policy then used is given. (1) The words are quite general, and ought to be so construed unless some good reason is given for restraining them,—that, "in case of *any* loss or misfortune, it shall be lawful" to "sue, labour, and travel for, in and about the defence, *safeguard*, and recovery of the subject-matter," "without prejudice to this *insurance*" (not abandonment, as in the French Ordonnance hereafter cited), "the charges whereof the said company will bear," "in proportion to the sum hereby insured" (not the amount saved, as in the French Ordonnance). Up to this point, there is not a word about abandonment: and this is the whole of the usual clause. The meaning is obvious, that, if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent. and the goods are wetted in a storm which

(1) Emerigon, by Boulay-Paty, vol. ii. p. 239.

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drives the ship into a port of distress, where by drying at an expense less than 5 per cent. the goods might be saved or damaged under 5 per cent., whilst, if not dried, they would decay and become damaged over 5 per cent., though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject-matter to which they relate, therefore, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.

There remains to be considered, thirdly, whether the application of the suing and labouring clause is excluded in this particular case by the warranty against particular average,—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt." And this depends upon whether the expression "particular average" in this context, and construed, according to the golden rule, by what goes before and follows in the policy, includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty.

This is a question the answer to which involves most important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the warranty against total loss only, excludes the operation of the suing and labouring clause even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word "average" has some fixed and definite meaning so rigid and inelastic that it cannot be modified or limited so as to apply to loss of or damage to the thing insured (the sense in which it has been hitherto understood by average-staters); but that it must needs also include contribution to any labour incurred in the defence and safeguard of the thing insured, so that even an express clause left standing in the policy with reference to such labour (the suing and labouring clause) must be rejected as inconsistent

with the warranty. If this be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage: and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memorandum alone. Two results would follow, both novel in practice, and one at least very remarkable.

The first would be unfavourable to the underwriters in a novel way, because the memorandum was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear. The exception of stranding tends to shew that this was the scope of the memorandum; for, it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the given percentage, was nevertheless not to be attributed to the perishable nature of the goods themselves. Accordingly, the rule has been, to pay for damage to memorandum articles only where it exceeded the specified percentage, and not to allow this percentage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case already put, of goods wetted by a storm, the amount of expenses reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clause, however small in the result be the loss or damage to the goods; and the loss of or damage to the goods is paid if it amount to the stipulated percentage, but not otherwise; and the amount of expenses is not added in order to make up that percentage. Thus, if the agreed percentage be 5 per cent., and the expenses amount to 2 per cent., and the loss or damage to 3 per cent., only the expenses are paid, and not the average. But, if we hold that the warranty excludes the application of the suing and labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate.

Upon the other hand, if the expenses should be less than the percentage, and a loss is thereby prevented either altogether or to an extent less than the percentage; as, if, in the case put, the expenses were 3 per cent. and the damage only 1 per cent., according to the present practice the underwriters would pay the

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expenses; but, if we decide for the present defendants, the underwriters, though saved from loss, would be altogether exempt from contribution.

In our view, however, we are not compelled to adopt so inconvenient and unpractical a conclusion. The word "average," so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defence or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matter, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Maclachlan in Arnould on Insurance. (1) Amongst the various uses to which the word has been applied, no doubt, that of "small expenses" is one, as in the usual clause in a charterparty. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back except at an expense equal to its value when recovered.

The question here, however, is not as to the extension of which the term "average" is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and labouring clause, which for the reasons already given specially provides for this case, has been allowed to remain a part of the policy; and that a special provision as to a particular subject-matter is to be preferred to general language, which might have governed in the absence of such special provision. "Generalia specialibus non derogant." "Specialia generalibus derogant."

In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is, that the warranty against particular average, does no more than limit the insurance to total loss of the freight by the perils insured

(1) 3rd ed. vol. ii. p. 739.

against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against; and that the latter expenses are specially provided for by the suing and labouring clause, and may be recovered thereunder.

Much reliance was placed, for the defendants, upon two recent decisions which are said to have determined that there could be no liability under the suing and labouring clause where there was none under the policy: *The Great Indian Peninsular Railway Company* v. *Saunders* (1), and *Booth* v. *Gair* (2),—the first of which cases was decided before and the other after the date of the present policy.

Before these decisions, the liability of the underwriters appears to have been universally admitted and acted upon even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded.

Probably the underwriters, up to the time of the first of these decisions, thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to preserve the subject-matter of insurance, that they preferred paying in all unsuspicious cases, without nice inquiries as to whether the expenses had in the particular instance averted liability. In so doing, they not only acted with liberality, but no doubt also best studied their own interests; and, whilst they calculated the premium so as to include a remuneration for the extra liability which they were satisfied to bear, they probably at the same time found that the encouragement to fair dealing thereby afforded was their best security against the more serious losses that might arise from neglect of precautions of which the expense was thrown upon the assured.

This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause; because, though usage may impose a meaning upon a word such as "average," it

(1) 1 B. & S. 41; 30 L. J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.
(2) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

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cannot alter the rules of construction: and, in the cases referred to, the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average, under circumstances under which the underwriters could not have been liable if the expenses were not incurred, was not within the true intent and meaning of the suing and labouring clause, which in the context of a policy of insurance could only extend to suing and labouring by means of which the underwriters might obtain a benefit.

In *The Great Indian Peninsular Railway Company* v. *Saunders* (1), the goods were iron rails for Bombay, shipped to be paid for lost or not lost. They were insured with a warranty "free of particular average unless the ship should be stranded, sunk, or burnt." The vessel on her way put into Plymouth, where she was a total loss; but she was not "stranded, sunk, or burnt." The rails were saved and sent on by other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable: and Blackburn, J., in delivering the judgment of the Court, carefully abstained from deciding the question now before us; for, he said (2): "It is not necessary to decide whether an underwriter on a policy against total loss only, is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance (3); and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for, it would not have been a constructive total loss, according to

(1) 1 B. & S. 41; 30 L. J. (Q.B.) 218: in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.

(2) 1 B. & S. 53; 30 L. J. (Q.B.) 222.

(3) 3rd ed. vol. ii. p. 464, s. 1777.

Rosetto v. *Gurney* (1), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here: and an actual total loss is out of the question." That judgment was affirmed in the Exchequer Chamber, where Erle, C.J., in like manner, delivering the judgment of the Court, said (2): "The expenses that can be recovered under the suing, labouring, and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety: and the question is, were those expenses incurred to prevent a total loss? Had the owners a right, when the goods were given into their possession, to turn the transaction into a total loss? Certainly not; for, they had their goods in specie, and consequently that 825*l.* 11*s.* 7*d.* had no reference to suing, labouring, or travelling to prevent such a loss."

That case was followed by *Booth* v. *Gair* (3), in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general or the ship were stranded, sunk, or burnt." The vessel on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled, and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie, and was not totally lost, constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived; but certain expenses were incurred in the way of extra freight, transhipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances, under the name of particular charges. The judgment was for the underwriters, upon the ground stated by Erle, C.J., viz. that "what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question." No notice appears to have been taken of the practice

(1) 11 C. B. 176; 20 L. J. (C.P.) 257.
(2) 2 B. & S. 273.
(3) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

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of underwriters, probably for the reason already mentioned, that, although usage may give to the words "average," "particular average," or "average unless general," a conventional meaning, so as to make them include partial loss or damage of the subject-matter only, and not what are known as "particular charges," which fall within the suing and labouring clause, yet such usage could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion. That is the circumstance which distinguishes these cases from the present,—that the usage of underwriters already brought to the attention of the Court in *Booth* v. *Gair* (1) could not affect the decision in that case. These decisions, therefore, are inapplicable to the present case, and, when examined, prove to be anything but authority for the defendants.

Passages from Emerigon were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In chapter 12, s. 41, vol. i. p. 600, Boulay-Paty's edition, treating of general and particular average as between the owner of ship, freight, and goods, he says: "Les frais faits pour sauver la marchandise sont avaries simples pour le compte des propriétaires." He is not there giving an opinion upon the construction of the policy. He refers, however, to the 17th chapter, s. 7, for a discussion of the question of liability as between the insurers and the assured, either with or without a suing and labouring clause; and in that, which is the part of the work applicable to the present subject, he throughout treats the question as depending upon the very words of the suing and labouring clause.

Nothing can make this more clear than a reference to his treatment of the question: "Si les frais de sauvetage excédent la valeur des effets sauvés, cet excédant est-il à la charge des assureurs?" To which he answers: "Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs, indépendamment des sommes par eux assurées, sont tenus de payer l'excédant des frais de sauvetage"—Vol. ii. p. 238. He then sets out the forms of the suing

(1) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

and labouring clauses used at Antwerp, Rouen, Nantes, and Bordeaux; and he refers to a similar and more ancient one to be found in Loccenius, p. 981, by which the underwriters undertake for expenses incurred in the safeguard of the goods, even though no benefit should follow: and he remarks thereupon,—"Par ces formules les pouvoirs les plus libres sont donnés à l'assuré et à ses représentans, afin de les inviter à travailler au sauvetage, sans être arrêtés par la crainte d'en supporter euxmêmes les frais; mais les assureurs, en souscrivant pareils pactes, contractent à l'aveugle un engagement donc les conséquences sont indéfinies."

He then gives the London form of suing and labouring clause as then and still used; and he proceeds to say that the Marseilles policy (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was necessary in order to charge the Marseilles underwriters with the expenses.

This view, so far as it bears upon the present argument, is in accordance with the view of the London average-staters, and favours a distinction between loss and damage to the thing assured, and expenses incurred in its protection, and a separate provision for the latter.

In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the cases of the greater perils of shipwreck or stranding, and then only to the value of the property saved for the underwriters. Thus, by the Ordonnance de la Marine of 1681 (1),—"En cas de naufrage ou échouement, l'assuré pourra travailler au recouvrement des effets naufragés, sans préjudice des delaissements qu'il pourra faire en temps et lieu, et du remboursement de ses frais dont il sera cru sur son affirmation jusqu'a concurrence de la valeur *des effets recouvrés*." This is followed closely, though not exactly, by the Code de Commerce, art. 381, with the difference that the latter, by using the word "doit" instead of "pourra," makes such exertions the duty, and not merely the privilege, of the assured.

Read by the light of this text of the Ordonnance, the views of

(1) Liv. iii. tit. 6, art. 45.

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Emerigon, so far from being opposed to, are in favour of the construction which we adopt.

Hitherto we have only adverted in passing to the evidence and the finding of the jury upon the understood meaning in the business of marine insurance of the phrase "particular average." If necessary, we should have been prepared to hold that the evidence established such an understood meaning, according to which "particular average" does not include "particular charges," and to act upon such usage as equally sacred with the express part of the contract.

It is needless, however, to enlarge upon this part of the case, because, upon the facts proved, and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion that there was a danger of the total loss of the freight by reason of the loss of the ship by perils insured against; that the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think, that, in arriving at this conclusion upon the meaning of the contract into which the defendants have entered, we are deciding also in accordance with the approved usage of commerce.

The verdict for the plaintiffs was therefore right, and the rule to enter the verdict for the defendants is discharged.

Rule discharged.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendants: *Chester & Urquhart.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXIX VICTORIA.

HARTLEY *v.* HINDMARSH.

1866
May 25.

*Assault—Conviction by police magistrate—Proof of conviction—*24 *&* 25 *Vict. c.* 100, *ss.* 42, 45.

A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it.

Therefore, where a police magistrate, after hearing a case of common assault, ordered the accused to enter into recognizances and pay the recognizance fee, but did not order him to be imprisoned or to pay any fine, and an action having been subsequently brought for the same assault, the magistrate's clerk stated in evidence the above facts, but no record of the proceedings was put in:—

Held, first, that the above was not a conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, and was not a bar to the action.

Held, secondly, that the conviction, if any, was not proved.

DECLARATION for an assault.

Third plea, that the alleged trespass was a common assault, committed within the jurisdiction of the metropolitan police district, that is to say, within the jurisdiction of Wm. Partridge, Esq., then appointed for and acting in and for the metropolitan police district, and then sitting at the Thames Police Court, who, upon the complaint and charge of the plaintiff preferred by him in that

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behalf for the plaintiff then being the party aggrieved by the assault, then caused the defendant to be summoned to answer this complaint and charge, and to be further dealt with according to law; that the defendant afterwards, but before this action, and in accordance with the exigency of the summons, duly appeared before the magistrate, who, having in the presence of the defendant heard the complaint and charge of the plaintiff upon the merits, adjudged and determined the complaint and charge, and then ordered the defendant then to pay, and then convicted him the defendant in the costs as well of the said complaint and charge as of the hearing thereof, but did not further order or convict defendant; that the costs were the whole amount which the defendant was so adjudged to pay, and that immediately after the making of the said order and conviction, and before action, the defendant did duly pay the costs of the complaint and charge, and the hearing thereof, such costs being the whole amount which he was so ordered and convicted to pay as aforesaid.

To this plea the plaintiff demurred, and also took issue thereon.

The issues in fact were tried before Montague Smith, J., at the sittings in London after last Hilary Term, when the clerk to the police magistrate was called and stated that the defendant had been summoned to answer the complaint of the plaintiff, and that the magistrate had heard the charge, and convicted the defendant, but had not ordered him to be imprisoned or to pay any fine, nor to pay the costs of the summons or the hearing, but had ordered him to enter into his own recognizances in 10*l.* to keep the peace for six months, and to pay the recognizance fee of 2*s.* The clerk likewise stated that no record was kept of the conviction, and that it was not usual for any record to be kept of the convictions before the police magistrates. He produced a book in which was an entry as follows: "Recognizance in 10*l.*, fee paid." A verdict was entered for the plaintiff, with leave to the defendant to move to enter the verdict on the third plea.

Digby Seymour, Q.C., obtained a rule pursuant to the leave reserved. The rule came on for argument with the demurrer to the plea.

Parry, Serj., and *Walters*, for the plaintiff. The plea is founded

on the 24 & 25 Vict. c. 100, ss. 42, 45. By section 42 a magistrate is empowered to convict a person charged before him of a common assault, and to order him to pay a fine or be imprisoned; here the magistrate did neither, and the act says nothing about convicting a person in the costs, which is what is alleged in the plea. Section 45 makes a conviction before a magistrate a bar to a civil action for the same assault, but in this case the defendant never was convicted within the meaning of the act. Even if the defendant was convicted there was no legal proof of it, for a conviction can only be proved by the record of it, and not by the statement of the magistrate's clerk.

Digby Seymour, Q.C., and *Tapping*, for the defendant. Whatever verbal criticism may be raised, there can be no doubt that the defendant was in fact convicted by the magistrate. The case having been heard on the merits, the magistrate could only convict or acquit him, and it is clear that he did not do the latter; if he had, the defendant could have obtained a certificate of it, which would have been equally a bar to the present action. The object of the statute was to prevent a person being twice vexed on the same subject, and therefore whether he is acquitted or convicted, the judgment is a bar to a civil action for the same assault. It is the conviction which is the bar, not the drawing up the record of it, and it is of no importance, therefore, that no record of the conviction was drawn up: *Ratt* v. *Parkinson* (1); *Ex parte Johnson.* (2)

ERLE, C.J. I think our judgment must be for the plaintiff. I think there was no evidence that there was a conviction, with an order to pay the costs, as alleged in the plea. The magistrate after hearing the case ordered the defendant to enter into recognizances in 10*l.*, but that was in his character of conservator of the peace, and was not an adjudication upon the case. I think, too, the plea is bad, because it does not bring the case within the terms of the 45th section of the act. (3) In order that there may be a bar to a civil action there must either be an acquittal, or a conviction followed by fine or imprisonment; here there was neither.

(1) 20 L. J. (M. C.) 208. (2) 3 B. & S. 947; 32 L. J. (M. C.) 193.
(3) 24 & 25 Vict. c. 100.

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I think, moreover, that the conviction, if there had been one, could only have been proved in the ordinary way, according to the common law, by the production of the record, or an examined copy of it.

WILLES, J. I am entirely of the same opinion. The plea was certainly not proved, because it alleges that the defendant was convicted in the costs of the complaint and the hearing, and it appears that such was not the case. Moreover, the conviction would not in any case be such as was intended by the statute.

BYLES, J. I am of the same opinion. I think the plea bad, and also that it was not proved; the proof could only be by the production of the record of the conviction, or of an examined copy of it. The magistrates need not draw up a record of the conviction at the time, but if it is required subsequently, they are bound to do so.

MONTAGUE SMITH, J. I am of the same opinion. The proceeding before the magistrates will be no bar to an action unless all the conditions of the statute have been complied with. There must be a dismissal of the charge, or there must be a conviction accompanied by a fine or imprisonment, and that fine paid, or imprisonment suffered. Here the magistrate only ordered the defendant to pay a recognizance fee, and there is no record of it, except an entry in the magistrate's book: "Recognizance in 10*l.*, fee paid."

Rule discharged, and judgment for the plaintiff.

Attorneys for plaintiff: *Ley & Brocklesby.*
Attorney for defendant: *Braund.*

CONNELLY *v.* BREMNER.

1866
June 4.

Practice—Time to plead—Rule of court, Easter Term, 1856.

A defendant, who has a day's time to plead from the happening of an event, has the whole of the day following that on which the event happens in which to plead.

The rule of court, which orders that "service of pleadings, if made after two P.M. on Saturday, shall be deemed as made on the following Monday," was not intended to affect the rights of parties, but only to relieve the clerks in the plea office.

Therefore, when a defendant had one day's time to plead from the return of a cheque, which was returned on Friday, and the plaintiff signed judgment on Saturday after two o'clock, no plea having been delivered:—

Held, that the judgment was irregular.

An order had been made by Willes, J., at chambers, giving the defendant one day's time to plead from the return of a cheque to him by the plaintiff. The cheque was returned on the morning of Friday, May 4th. On Saturday, the 5th, shortly before five P.M., the plaintiff signed judgment for want of a plea, no plea having then been delivered. An application having been made to Byles, J., at chambers, to set aside this judgment as irregular, with costs, he refused to do so; but on an affidavit of merits he made an order setting aside the judgment on payment of costs by the defendant.

Sir G. Honyman obtained a rule to shew cause why the order should not be varied to one setting aside the judgment with costs against the plaintiff; and why the plaintiff should not repay to the defendant the costs paid to him under the order of Byles, J.

R. G. Williams shewed cause. The defendant was bound to deliver his plea on Saturday, and since by the rule of Easter Term, 1856, service of pleadings after two o'clock on Saturday is to be deemed as made on Monday, he was bound to deliver the pleas before two o'clock; at any time after that hour, therefore, the plaintiff was entitled to sign judgment. It is true that on other days the defendant has till the judgment office opens on the following morning in which to plead, but this is only because on other days the judgment office closes at the same time as the plea office. The plaintiff may sign judgment at any time after the plea

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office has closed on the day on which the pleas are to be delivered; on Saturday the judgment office remains open till five o'clock.

Sir G. Honyman, in support of the rule, was not called on.

ERLE, C.J. The rule of practice is laid down generally in Chitty's Practice, p. 246, 11th ed. If the defendant do not plead on or before the day on which the time for pleading expires, the plaintiff may sign judgment at the opening of the office on the morning of the following day, unless in the meantime, and before the signing of it, the defendant has delivered a plea. Accordingly, the defendant had all the day of Saturday to plead, and till eleven o'clock on Monday, because the judgment office is not open till then. But it is said that, by a rule of court, pleas must be delivered on Saturday before two o'clock. That is merely an exception for the benefit of the clerks in the plea office, and was not intended to alter the rights of parties in any way. The order of my Brother Willes was intended to give the defendant, not merely a fragment of a day, but a clear day, in which to plead; and if he delivered his plea at any time on Saturday, or before the judgment office opened on Monday morning, it was in time. I think, therefore, the judgment was irregular and should be set aside, but under the circumstances without costs to either party, and that the plaintiff should repay to the defendant the costs he has received from him.

WILLES, J. I am of the same opinion. I can say that it was not intended that the rule should alter the rights of parties. It is still stated in Chitty, that the defendant has up to eleven o'clock on the following day to plead.

KEATING, J. I am of the same opinion; but as the terms of the rule might well lead the plaintiff to suppose that he had a right to sign judgment, it would be unfair to make him do more than pay back the costs he has received from the defendant.

MONTAGUE SMITH, J. I am quite willing to concur with the rest of the Court, though I should have had great difficulty in holding differently from my Brother Byles, had I been sitting at chambers.

Rule absolute accordingly.

Attorneys for plaintiff: *Nethersole & Speechly.*

Attorneys for defendant: *Thomas & Hollams.*

MULLETT *v.* MASON. 1866
June 8.

Damages—Fraudulent misrepresentation.

In an action for fraudulent misrepresentation the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations.

Therefore, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died:—

Held, that the plaintiff was entitled to recover as damages the value of all the cows.

THE first count of the declaration was on a warranty, on the sale of a cow, that the cow was free from disease; the second count was for falsely and fraudulently representing the cow to be free from disease, and inducing the plaintiff thereby to buy it; the third count alleged that the defendant was possessed of a cow which, as the defendant then well knew, was a foreign cow imported into England from parts beyond the seas, and had not come from the farm of the father of the defendant, and was then suffering from a disease which would infect other cows with which it might be placed or come into contact; and the defendant by fraudulently concealing from the plaintiff that the said cow was diseased, and representing to him that it was free from disease, and that it was not a foreign cow, and that it had come from the farm of the defendant's father, induced the plaintiff (who was then a farmer possessed of other cows as the defendant well knew) to buy the said cow for 10*l.* 15*s.*, which the plaintiff paid to the defendant; by means of which said several premises the plaintiff lost the said sum of money, and the cow became of no use to the plaintiff, and infected other cows of the plaintiff with the said disease, and the plaintiff was compelled to sell them at a much lower price than he otherwise would have obtained for them, and the plaintiff otherwise incurred great expense and trouble.

The defendant pleaded to the first count a denial of the warranty and of the breach of it; and to the second and third counts

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not guilty, and that the cow was not diseased as alleged. Issues thereon.

At the trial before Pigott, B., at the spring assizes at Stafford, it appeared that the plaintiff had purchased a foreign cow of the defendant, remarking at the time of the purchase that it seemed ill, but the defendant assured him that it was an English cow, bred on his father's farm, and warranted it sound. The plaintiff placed it in his cow-house with five other cows, and it soon became worse and eventually died of the cattle plague; the other five cows also subsequently died of the same disease, the one that was next to the cow bought of the defendant being the first that shewed symptoms of it.

The jury found that the defendant warranted the cow sound, and that he fraudulently misrepresented to the plaintiff that it was free from an infectious disease, though he at the time knew that it was suffering from an infectious disease, but that he did not know that the disease was the cattle plague.

A verdict was entered for the plaintiff for 109*l.*, being the value of the six cows that died, leave being given to the defendant to move to reduce the verdict to 11*l.*, being the value of the cow he sold to the plaintiff.

H. Matthews having obtained a rule pursuant to the leave reserved,

Huddleston, Q.C., and *H. James*, appeared to shew cause, but the Court called on

H. Matthews, to support the rule. If the defendant is liable for all the consequences of a disease introduced among the plaintiff's cattle by an infected cow that has been sold by him, there is no limit to the amount for which he might have been answerable if the plaintiff had possessed large herds and the disease had spread accordingly. The damages cannot be different whether the action is on a warranty or on a fraudulent misrepresentation; in either case they will be measured by the loss to the plaintiff, which is the immediate result of the defendant's act. In this case it was the plaintiff's act in putting the cow along with the others, and not the defendant's act in selling the cow to him, which was the immediate cause of their taking the disease.

[WILLES, J. There was a case in the Exchequer tried before me at Newcastle spring assizes, 1859, in which a chemist who sold ointment to rub sheep with was held liable to pay to their owner the whole of their value, 2000*l.* and upwards, it having killed them; although it was hard that a man who could only make a profit of a few pence should be made responsible for so heavy a loss.]

There the ointment was sold for the express purpose of being rubbed into the sheep.

[ERLE, C.J. In *Randall* v. *Raper* (1), a man sold seed of a quality inferior to that which he warranted, and the plaintiff having sown it and a worse crop having come up, he was held entitled to recover the difference in the value of the crops. So in *Dingle* v. *Hare* (2), the vendor of manure was held liable for the loss of crops on the land on which it was used, occasioned by its being not so good as it was warranted.]

In those cases the goods were sold for the purpose of being used in the way which caused the loss. *Langridge* v. *Levy* (3) is another illustration; there the gun was distinctly sold for the purpose of being used by the plaintiff's son, and warranted to be fit for that purpose, and it was the using it for that very purpose for which it had been so sold that caused the injury. The cow was not sold for the purpose of being placed with other cows. *Hadley* v. *Baxendale* (4) decides that the damage must be the immediate result of the defendant's act; and when the case of *Borradaile* v. *Brunton* (5) was quoted, in which the vendor of an iron chain was held responsible for the loss of an anchor which was caused by its breaking, Alderson, B., asked, "why, on the same principle, should not the defendant have been liable for the loss of the ship"? and Parke, B., said that that case had been commented on in Sedgwick on Damages (6), and that the correctness of the report was doubtful. *Hill* v. *Balls* (7) was a case very similar to the present. There, the plaintiff had bought from the defendant a glandered horse and placed it in his stables,

(1) E. B. & E. 84; 27 L. J. (Q.B.) 266.

(2) 7 C. B. (N.S.) 145; 29 L. J. (C.P.) 143.

(3) 2 M. & W. 519.

(4) 9 Ex. 341; 23 L. J. (Ex.) 179.

(5) 8 Taunt. 535.

(6) See p. 88, 3rd ed.

(7) 2 H. & N. 299; 27 L. J. (Ex.) 45.

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and another horse having caught the glanders from it and died, the Court held that the plaintiff could not recover its value, the damage being too remote.

[WILLES, J. In that case there was no warranty.]

But there the plaintiff contended that the public sale of the horse was illegal, and Bramwell, B., says that, even if that were so, there was no damage flowing immediately from it, and proceeds: "Had he (the plaintiff) thought fit at once to kill it he would have sustained no loss but his first loss. But his buying and dealing with it as he did, are entirely his own acts, and not the result in any sense, certainly not the necessary result, of any act of the defendant." This is equally true in the present case. But for the act of the plaintiff in placing the cow he bought from the defendant with the others, the injury would not have occurred.

[WILLES, J. It does not follow, from the mere purchase by a man of a glandered horse, that he should put it with others which may catch the disease from it; but it does follow naturally that when the vendor has represented it to be sound the buyer should treat it as being so, and place it in his stable. It was held in *Collen* v. *Wright* (1) that the costs of a chancery suit may be recovered from a person who has represented himself as having authority to contract, if the suit has been entered into on the faith of his representations. Bramwell, B., cannot have meant, therefore, that the defendant was in no case liable if the injury would not have happened without some act of the plaintiff.]

If the cow had been still worse, so that it had died before the plaintiff got it home, he could only have recovered its value. The fact that the defendant's fraud was less, gave the plaintiff an opportunity of dealing with it as he did, but this should not increase the defendant's liability. There is no evidence to shew that the defendant knew that the plaintiff had other cows, or was likely to deal with the one he bought as he did.

[WILLES, J. The plaintiff did not put the cow with any unusual animals.

ERLE, C.J. The plaintiff might do what was usual and na-

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147. In error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.

tural with the cow, and if by the laws of nature damage has followed the defendant must make it good.]

The plaintiff suspected that the animal was ill, as is shewn by his requiring a warranty, and he was bound to take ordinary precautions, and not place it with other animals till he knew whether it was really ill or not; if he did so he did it at his peril.

ERLE, C.J. I think that this rule should be discharged. The plaintiff bought a cow of the defendant who warranted it sound, though at the time it had the cattle plague; the breach of warranty, therefore, is undoubted. But the plaintiff also complains that the defendant fraudulently represented to him that it had no infectious disease while he knew that it had. I do not stop to inquire what would have been the measure of damages if there had only been the warranty, because it is clear that if a seller makes a fraudulent representation to a buyer to induce him to buy, the buyer has a right to act upon it as if it were true, and if he does so the seller must compensate him for all the direct consequences that naturally follow from it. In the present case, therefore, the defendant is liable for all the direct consequences of the plaintiff treating the cow as if it was free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that.

WILLES, J. I am of the same opinion. The only authority that at all made me hesitate was the judgment of my Brother Bramwell in *Hill* v. *Balls*. (1) But when that is looked at more carefully it turns out to be inapplicable, because the present case is founded on a misrepresentation of the defendant, and it was the fact of the plaintiff acting on that representation which caused the injury, while my Brother Bramwell rests his judgment on the fact, that the defendant's agreement in that case did not contain anything which could reasonably induce the plaintiff to do that which caused the damage, viz. put the horse in the stable along with others. I agree with my Lord that it is unnecessary to say what the plaintiff would be entitled to recover if he rested his case only

(1) 2 H. & N. 299; 27 L. J. (Ex.) 45.

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on the warranty; but the plaintiff seeks to be indemnified for injury which he has sustained through the fraud of the defendant. The defendant induced the plaintiff to buy the cow by representing that it was sound when he knew that it was not so, and that it might communicate the disease to any other cattle with which it might be placed. Was it not necessarily within the contemplation of the parties that it might be placed with other cows? The plaintiff was induced by the defendant's misrepresentation to treat it in the ordinary way, and the illness and death of the other cows was the direct and natural consequence of his doing so.

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Combe & Wainwright.*
Attorney for defendant: *Duignan.*

May 25.

SMITH *v.* THACKERAH AND ANOTHER.

Adjoining land-owners—Right to Lateral Support—Cause of action—Appreciable damage.

SCR. 841. 9 C.B.D. 287

The right of the owner of land to the lateral support of his neighbour's land is not an absolute right, and the infringement of it is not a cause of action without appreciable damage.

Therefore, where A dug a well near B's land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B's land, the land would still have sunk, but the damage to B would have been inappreciable:—

Held, that B had no right of action against A.

DECLARATION that the plaintiff was possessed of certain land, and the land received lateral support from certain land adjoining thereto; and the defendants dug and made on this adjoining land an excavation or well near to the land of the plaintiff, and the defendants thereby, and for want of keeping and continuing the sides of the well shored up, or otherwise preventing the consequences hereinafter mentioned, wrongfully deprived the land of the plaintiff of its support, whereby the land of the plaintiff sank and gave way, and divers walls, buildings, and premises of the

plaintiff on the land sank and were damaged, whereby the plaintiff was put to great expense, &c.

Pleas, Not guilty, and not possessed.

At the trial before Erle, C.J., at the last Surrey spring assizes, it was proved that the plaintiff was possessed of a piece of land on which a building had been recently erected, and that the defendants, who were neighbouring landowners, dug a well on their own land near to that of the plaintiff, and afterwards filled up the well with such loose earth that the ground round it sank, and the plaintiff's building was injured, causing damage to the amount of 15*l.*

The jury found, in answer to questions by the Chief Justice, that the land of the plaintiff would have sunk if there had been no building on it, and that some particles of sand from it would have fallen on to the defendants' property, but that the plaintiff would have suffered no appreciable damage.

A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for such sum under 15*l.* as the Court should direct, on the ground that the facts proved at the trial entitled the plaintiff to a verdict without proof of any pecuniary damage.

Robinson, Serj., having obtained a rule nisi pursuant to the leave reserved,

Joyce shewed cause. If the buildings had not been on the land the damage would have been inappreciable, and there would have been no right of action. The right of action does not arise when the adjacent ground is removed, but only when the injury happens to the plaintiff's land: *Bonomi* v. *Backhouse.* (1)

Robinson, Serj., and *Joseph Sharpe*, in support of the rule. The defendants had no right to cause the plaintiff's land to sink, and the jury having found that the land would have sunk even if the plaintiff had not erected any buildings on it, the plaintiff is at least entitled to nominal damages: *Ashby* v. *White.* (2) *Brown* v. *Robins* (3) shews that he is entitled to recover compensation for

(1) 2 E. B. & E. 622, 646; 27 L. J. (Q.B.) 378; 28 L. J. (Q.B.) 378. In the House of Lords, 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(2) 1 Sm. L. C. 5th ed. 216.

(3) 4 H. & N. 186; 28 L. J. (Ex.) 250.

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the fall of the house, which was an injury naturally resulting from the defendants' wrongful act.

ERLE, C.J. I am of opinion that this rule should be discharged. There is no doubt that a right of action accrues whenever a person interferes with his neighbour's rights, as, for example, by stepping on his land, or, as in the case of *Ashby* v. *White* (1), interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbour; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act. In the case of *St. Helen's Smelting Company* v. *Tipping* (2), in which the defendant had set up some chemical works, the House of Lords held that, if the noxious vapours did not cause material damage to the plaintiff, he had no cause of action. In the present case the digging the well and filling it up again were in themselves perfectly lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action.

BYLES, J. I am of the same opinion. In actions for a trespass the trespass itself is a sufficient cause of action. But in actions for indirect injuries like the present, the judgment of the House of Lords in *Bonomi* v. *Backhouse* (3) shews that there is no cause of action if there be no damage, and I cannot distinguish between no appreciable damage to the land in its natural state and no damage at all.

MONTAGUE SMITH, J. I am of the same opinion. The mere subsidence of the surface of the soil is not necessarily an injury, and we are bound by the verdict of the jury, who found that in

(1) 1 Sm. L. C. 5th ed. 216. (2) 11 H. L. C. 642; 35 L. J. (Q.B.) 66.
(3) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

fact no appreciable damage would have occurred if these new buildings had not been on the land.

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Rule discharged.

Attorney for plaintiff: *Rowland Miller.*

Attorneys for defendants: *John & Walter Butler.*

WALESBY *v.* GOULSTON.

June 9.

Costs—County Court—"Admitted set-off"—19 & 20 Vict. c. 108, s. 24.

By 19 & 20 Vict. c. 108, s. 24, where in any action the debt or demand consists of a balance not exceeding 50*l.*, after *an admitted set-off* of a debt or demand claimed or recoverable by the defendant from the plaintiff, the county court shall have jurisdiction to try such action. The plaintiff sued in a superior court for a debt of 51*l.*, the defendant pleaded a set-off; and the cause having been referred, the plaintiff admitted the set-off, and had an award for the balance, which was under 20*l.*:—

Held, that "admitted set-off" meant a set-off admitted before action brought; that a county court, therefore, had no jurisdiction over the plaintiff's cause of action, and the plaintiff was consequently entitled to costs.

THIS was an action brought to recover the sum of 51*l.* 17*s.* 11*d.* for work done and materials provided. The defendant pleaded a set-off.

The cause was referred to one of the masters, and before him the plaintiff admitted the set-off of 32*l.* 3*s.* 2*d.*, and the master gave a certificate for the balance of 19*l.* 14*s.* 9*d.*

Prentice having obtained a rule to shew cause why the Court should not, under 15 & 16 Vict. c. 54, s. 4, order that the plaintiff recover his costs of suit, on the ground that no plaint could have been entered in the county court for the plaintiff's demand,

Beresford shewed cause. The plaintiff claims his costs under the 15 & 16 Vict. c. 54, s. 4, and the question turns on the interpretation of 19 & 20 Vict. c. 108, s. 24. (1) In this case there was

(1) 19 & 20 Vict. c. 108, s. 24. "Where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the [county] court shall have jurisdiction to try such action." By 15 & 16 Vict. c. 54, s. 4, the Court is to make an order for costs, though the sum recoverable do not exceed 20*l.* inter alia, if the cause of action be one "for which no plaint could have been entered in any county court."

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a set-off which reduced the amount to which the plaintiff was entitled below 20*l.*; and the question is, whether it was an "admitted" set-off within the meaning of 19 & 20 Vict. c. 108, s. 24, so that a plaint could have been issued for the debt in a county court. In *Turner* v. *Berry* (1) it was held that under the original County Court Act (2), where a debt was reduced below 20*l.* by payments on account, the county court had jurisdiction. In *Hudspeth* v. *Yarnold* (3) the plaintiff sued for a sum above 20*l.*, but the defendant having proved a plea in abatement that part of the debt was a joint debt, he obtained a verdict for only 12*l.*, and the Court held that he was not entitled to costs. So in *Beard* v. *Perry* (4) it was held, that if a set-off be proved, the plaintiff only "recovers" the sum actually awarded by the verdict, and not his whole debt, and is not entitled to costs if the verdict be under 20*l.* *Avards* v. *Rhodes* (5) was decided on the words of 9 & 10 Vict. c. 95, s. 58, and it was held that "balance of account" meant balance of account after part payment, but it was there held that a set-off admitted by both parties was payment, and the words "admitted set-off" in the section now under consideration cannot, therefore, mean admitted by both parties, for then the clause would have been unnecessary; if the plaintiff admits it, and recovers only the difference, it is sufficient.

[WILLES, J. The 35th rule of the County Court Rules says that when part of the debt is abandoned, or set-off admitted, it should be stated in the particulars.]

Yes; and if there is a set-off, the plaintiff must know it, and he is really seeking to recover only the balance.

[WILLES, J. In 15 & 16 Vict. c. 54, s. 4, the expression used is "for which no plaint *could* have been entered." Could not the plaintiff have entered a plaint and obtained all he was entitled to by admitting the set-off?]

Yes; and there is no hardship in holding that the plaintiff in such a case is not entitled to costs, because if there is a bonâ fide dispute with respect to the set-off, he can apply to a judge for a certificate that the cause was fit to be tried in a superior court.

(1) 5 Ex. 858; 20 L. J. (Ex.) 89.
(2) 9 & 10 Vict. c. 95.
(3) 9 C. B. 625; 19 L. J. (C.P.) 321.
(4) 2 B. & S. 493; 31 L. J. (Q.B.) 180.
(5) 8 Ex. 312; 22 L. J. (Ex.) 106.

Prentice, in support of the rule. The state of the law previous to the passing of the act 19 & 20 Vict. c. 108, is stated in the judgment of Pollock, C.B., in *Avards* v. *Rhodes*. (1) It was only by part payment that a debt could be reduced so as to give the county court jurisdiction; and a demand reduced by a set-off, unless such set-off had been so admitted by both parties as to amount to payment, was not within the statute. *Beswick* v. *Capper* (2) shews the same thing.

[WILLES, J. Was not the late act passed to alter this, and to give the county court jurisdiction when there was a set-off?]

No, because it only refers to "an admitted set-off." The admission must be by both parties, so that there is no dispute about it, and before the action is brought.

[BYLES, J. Can there be a set-off admitted by both parties which does not amount to payment?]

It would seem that there can. Here, however, there was no admission even by the plaintiff at the time the action was brought. A plaintiff is not bound to admit a set-off, though he may do so.

ERLE, C.J. I am of opinion that this rule should be made absolute. The plaintiff claimed 51*l.*, and at the time when the action was brought there was no formal admission before the Court of any set-off: in the final result, however, a set-off was established, and the plaintiff recovered less than 20*l.* The 19 & 20 Vict. c. 108, s. 24, gives the county court jurisdiction "where in any action the debt or demand consists of a balance not exceeding 50*l.* after an admitted set-off." I interpret this as meaning a set-off which a plaintiff chooses to admit at the time he sues in the county court. No doubt the present plaintiff might have admitted the set-off and issued a plaint in the county court, but in my opinion he had an option whether he would make the admission or not. I think the clause was introduced into the act because some persons thought that the right of every suitor to resort to the courts at Westminster Hall was one of the greatest value, and which should not be lightly taken away; but it was said if the parties choose to admit the set-off, then the plaintiff may sue in the county court.

(1) 8 Ex. 312; 22 L. J. (Ex.) 106.
(2) 7 C. B. 669; 18 L. J. (C.P.) 216 n.

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think there is great doubt whether the set-off can be admitted by one party only, but here the plaintiff himself did not admit the set-off before action.

BYLES and MONTAGUE SMITH, JJ., concurred.

WILLES, J. I shall henceforth conform to the opinion of the rest of the Court.

Rule absolute.

Attorney for plaintiff: *T. Angell.*

Attorneys for defendant: *Elmslie & Co.*

June 21.

LIEVESLEY *v.* GILMORE.

Arbitration—Action on Award—Reference under a Judge's Order, by consent of Parties.

3 C. P. 256

An action having been commenced by the plaintiff against the defendant, by a judge's order made by the consent of the parties all matters in dispute were referred to arbitration, and it was ordered by the like consent that the parties should fulfil and perform the award of the arbitrator; subsequently an indorsement was made on the order under the hands of the plaintiff and defendant, that the arbitrator should have power to order what the parties should do to prevent a repetition of the injuries complained of. The arbitrator ordered the defendant to do certain things, and he having neglected to do them, the plaintiff brought an action for the non-performance of the award:—

Held, that the action would lie, as the order by consent was evidence of an agreement between the parties to perform the award.

Hookpayton v. *Bussell* (1) commented on.

DECLARATION that the plaintiff had commenced an action in this court against the defendant, the declaration containing various counts in trespass for alleged trespasses by the defendant upon land of the plaintiff adjoining land of the defendant, and also for a certain trespass alleged to have been committed by the defendant, by pulling down, removing, and destroying a certain fence which separated the land of the plaintiff from the land of the defendant, and which fence belonged to the plaintiff and defendant as tenants in common. That, thereupon, by a judge's order, made in the said action with the consent of the plaintiff and the defendant, it was ordered that the action, and all matters in difference between the parties, should

(1) 10 Ex. 24; 23 L. J. (Ex.) 267.

be referred to the award of J. W.; and by the like consent the said judge did further order that the parties should in all things abide by, perform, fulfil, and keep such award. That J. W., in pursuance of the order, took upon himself the reference; that by an indorsement on the order, under the hands of the plaintiff and defendant, it was agreed between them that the arbitrator should have power to order what the parties, or either of them, should do to prevent a continuance or repetition of the injuries complained of; that the arbitrator duly made and published his award in writing respecting the matters referred to; and thereby, with reference to the authority given to him by the indorsement on the order under the hands of the plaintiff and defendant to order and determine what he should think fit to be done by either of the parties to prevent a continuance or repetition of the obstructions and injuries complained of in the declaration, and for the settlement of all matters in difference between the parties as aforesaid, the arbitrator, amongst other things, did order and direct that the defendant should forthwith erect, or cause to be erected, a continuous wall of brick of a certain thickness, to divide the premises of the defendant which adjoined the premises of the plaintiff, from the premises of the plaintiff, such wall to be built in a certain line, &c.; that the defendant built the wall, but not in the manner and line directed by the award.

Demurrer and joinder.

C. Crompton, in support of the demurrer. This is in fact a declaration on an award, but no agreement to perform that award is alleged, and no action therefore can be brought for its non-performance. The only thing that appears on the face of the declaration is a judge's order, made no doubt by consent, that all matters in difference should be referred, and that the parties should in all things obey the award of the arbitrator. A judge's order, however, even if made by consent, is not an agreement, and no action can be brought if it be not obeyed; but the remedy is by attachment. No doubt in this case the parties indorsed on the order by consent an authority to the arbitrator to order what should be done by either party to prevent a repetition of the injuries complained of, but this was not a separate agreement, but merely enlarged the effect of the judge's order. It would lead to great inconvenience if

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an action could be brought to enforce an award made on a reference by judge's order, as that action might be referred, and if the defendant still refused to obey the arbitrator, an action might again be brought to enforce the second award. Many cases have established that no action will lie on a compulsory judge's order, and *Hookpayton* v. *Bussell* (1) decided that the fact of the order having been made by consent makes no difference. There, *Wentworth* v. *Bullen* (2) was referred to, and the dictum of Parke, J., that an action could be brought on a judge's order made by consent, was expressly dissented from. The consent of the parties is, in fact, a consent to submit to the judge's order, and to subject themselves to an attachment for disobedience to it, and they impliedly surrender their right to enforce otherwise what the judge orders. In *Thames Ironworks Company* v. *Patent Derrick Company* (3) it was also expresssly held that a judge's order by consent does not imply an agreement between the parties to perform the things ordered. The early cases, therefore, in which the judges seem to have been of a contrary opinion, must be held to have been overruled.

Holker, for the plaintiff, was not called upon.

ERLE, C.J. I am of opinion that our judgment should be for the plaintiff. The declaration sets out that an action had been brought by the plaintiff against the defendant, and a judge's order made by mutual consent to refer all matters in difference between the parties, and that it had been ordered by the same consent that the parties should abide by and perform the award. There was, therefore, an agreement between the parties that the matters in difference should be referred, and that the award should be performed; and there was also a judge's order to the same effect which could be enforced by attachment. Afterwards the parties made an indorsement on the order, giving the arbitrator power to order what the said parties, or either of them, should do to prevent a continuance or repetition of the injuries complained of. I am clearly of opinion that that is good evidence of a contract that the arbitrator should have power to order what the parties should do, and the indorsement being on an order in which there is a promise to abide by

(1) 10 Ex. 24; 23 L. J. (Ex.) 267. (2) 9 B. & C. 840.
(3) 1 J. & H. 93; 29 L. J. (Ch.) 714.

and perform the award of the arbitrator, it amounted to an agreement to perform whatever the arbitrator should order. It is said that an attachment on the judge's order would be a more convenient remedy; but I think not. If the defendant were attached and put in prison, he would be released by the Court on payment of certain fines and costs, and no stop would be put to the continuance of the injuries which it was the very object of the award to prevent. But it is said that the authorities shew that no action will lie on a judge's order. I have looked at *Hookpayton* v. *Bussell* (1), and in terms it supports Mr. Crompton's argument; but the order in that case provided that "if the defendant made default in payment, the plaintiff should be at liberty to issue execution by fieri facias or capias ad satisfaciendum." The agreement evidenced by the order, therefore, was an agreement that if the defendant failed to perform his part, the plaintiff should avail himself of that particular remedy. In *Thames Ironworks Company* v. *Patent Derrick Company* (2) the order similarly empowered the plaintiffs, in case the defendants made default, to issue execution for a particular sum, it therefore provided a particular form of remedy, and the ordinary remedy by action was consequently taken away. It is the same as the ordinary case in which the right of action is taken away by an agreement to refer all disputes to arbitration. The decisions, therefore, were in both cases correct, but the expressions used by the judges were wider than necessary. I think the opinion expressed by Parke, J., in *Wentworth* v. *Bullen* (3), in what was really a considered judgment rather than a dictum, was perfectly correct. He there says: "In considering the terms of this order I am inclined to think that there is evidence of a mutual agreement between the parties upon good consideration to forego the action for charging the plaintiff in execution for too much. . . The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge. The case of an agreement to refer by order of a judge is a familiar instance, many actions being brought upon such agreements."

BYLES, J. I am of the same opinion. In Williams' Saunders (4) it is laid down that every submission to arbitration im-

(1) 10 Ex. 24; 23 L. J. (Ex.) 267.
(2) 1 J. & H. 93; 29 L. J. (Ch.) 714.
(3) 9 B. & C. 840.
(4) Vol. ii. p. 61 *n.* note 2.

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plies an obligation to perform the award of the arbitrator; when the words "by mutual consent" are introduced, it seems to shew a previous consent and express agreement between the parties. It is said that if an action will lie in such a case as the present a perpetual series of actions might arise, but if such an abuse of its process were clearly shewn, the Court would, no doubt, interfere summarily to prevent it.

MONTAGUE SMITH, J. I am of the same opinion. I think an action will lie on an agreement embodied in a judge's order. Here the agreement is not found in the judge's order, but is indorsed on it without any further sanction. It is clear that there must have been an agreement between the parties, which is evidenced by that indorsement. At common law if there is an agreement and a breach of it, an action will lie. How is the right to an action ousted in the present case? It is said that the parties, by making their agreement a rule of court, impliedly waived their rights to bring an action, and agreed to be subject only to attachment. If this had been expressly stated in the order it might have had the effect contended for, but it cannot be implied from the circumstances of the case. I am not pressed by the argument from inconvenience. If a question is raised whether an order of an arbitrator has been properly complied with, I think it can usually be far better determined by a jury or another arbitrator than by the Court on affidavits. With respect to authority the cases are very strong to shew that we are arriving at no new conclusion. That an action will lie on a submission by a judge's order is stated in 2 Williams' Saunders, 62 b, and in *Wharton* v. *King* (1), where the precise point now made was taken and overruled by Lord Tenterden.

Judgment for the plaintiff.

Attorney for plaintiff: *E. K. Randell.*
Attorneys for defendant: *Gregory & Rowcliffes.*

(1) 1 Mood. & Rob. 96.

BUDENBERG, APPELLANT; ROBERTS, RESPONDENT. 1866 *June* 21.

Customs—22 & 23 *Vict. c.* 37, *ss.* 6, 8—*Importer.*

By the Customs Amendment Act, 1859, (22 & 23 Vict. c. 37) s. 6, any person who "shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination," shall be liable to a penalty. By s. 8, "the word importer in any act relating to the customs is to apply to, and include, any owner or other person for the time being possessed of or beneficially interested in any goods imported":—

Held, that the interpretation of the word "importer," in the 8th section, is not to be applied to the phrase, "cause to be imported," in the 6th section; but that these latter words are only applicable to a person who has ordered the goods, or otherwise in fact caused them to be imported.

Held, also, that to constitute the above offence, it was not necessary that the goods of either denomination should be subject to duty on importation.

Re Mylchreest 2 C. P. 29 2

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate for Liverpool.

An information had been laid by the respondent, an officer of customs, under the direction of the commissioners of customs, against the appellant, charging that he had caused to be imported goods of one denomination concealed in certain packages of goods of another denomination, contrary to the 6th section of the Customs Amendment Act, 1859 (1), whereby he had forfeited the penalty of 100*l.* for which the commissioners had elected to sue.

(1) The Customs Amendment Act, 1859, (22 & 23 Vict. c. 37) s. 6: "If any person shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination, or shall directly or indirectly cause to be imported or entered any package of goods as of one denomination, but which shall afterwards be discovered, either before or after delivery thereof, to contain other goods subject to a higher rate of duty than those of the denomination by which such package was entered, such package, and all goods contained therein, shall be forfeited, and every person shall forfeit and pay for every such offence a penalty of 100*l.*, or treble the value of the goods contained in such package, at the option of the commissioners of customs." Sec. 8: "For the removal of doubts as to the meaning and application of the word importer, as used in the Customs Acts, the word importer, in any act relating to the customs, is hereby declared to apply to and include any owner or other person for the time being possessed of, or beneficially interested in, any goods imported into the United Kingdom, from the time of the importation thereof until they shall, on payment of the duties thereon, or otherwise, be duly delivered or discharged from the custody or control of the customs."

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The case stated that one Ehrenberg, on the 15th December, 1865, shipped at Antwerp, on board the *Neva* steamer for Liverpool, eight casks, which he represented as containing china clay. Ehrenberg consigned the casks to Messrs. Dunkerley & Steinmann, of Liverpool, the agents for the *Neva*, and took from the captain of the vessel, a bill of lading in the ordinary form, undertaking to deliver the casks to Messrs. Dunkerley & Steinmann, or their order, and by a letter dated Antwerp, 15th December, 1865, he wrote to Messrs. Dunkerley and Steinmann with the bill of lading, and stated that the casks were for account of Messrs. Schaffer & Budenberg (the latter being the appellant in this case), whose directions they would have to follow. In each of the casks of clay so shipped by Ehrenberg was concealed a keg of gunpowder.

On the 17th of December, Messrs. Dunkerley and Steinmann received from Messrs. Schaffer & Budenberg a letter, of which the following is a copy:

"Manchester, 16 December, 1865.
96, George Street.

Messrs. Dunkerley & Steinmann,
Liverpool.

Gentlemen,

We have been informed that Mr. Ehrenberg shall forward to your address, and for our disposal, by the steamer *Neva*, leaving Antwerp for Liverpool on Monday, 18th inst., eight barrels of china clay" (giving the numbers and weights).

Please store the above, informing us of their safe arrival, and we shall instruct you how to forward the same to different places.

(Signed,)
Schaffer & Budenberg."

On Sunday, the 17th of December, Ehrenberg, who was then in London, saw Budenberg, and informed him of the shipment to Messrs. Dunkerley & Steinmann of the eight casks and that the clay contained the kegs of gunpowder.

There was no evidence that prior to that date the appellant had any knowledge of the shipment of the clay, or of the fact of its containing the kegs of gunpowder. The *Neva* arrived in Liverpool on the 21st of December, and forthwith discharged her cargo.

On the 19th of December, the appellant went to Liverpool, and saw Messrs. Dunkerley and Steinmann. He then informed them of the fact that there was gunpowder contained in the clay, and requested them to take steps to get the casks passed through the custom house.

Messrs. Dunkerley and Steinmann thereupon took the usual steps to get the goods passed through the custom house, and their clerk asked the examining officer to pass them without examination, but on his refusal to do so, and after his directing a sub-officer to bore the casks, the clerk informed the custom house officer that there was gunpowder contained in the clay.

On receiving this information the custom house authorities caused the clay and the powder contained in it, to be seized, and caused the information above-mentioned to be laid against the appellant, his partner Schaffer being abroad.

Neither china clay nor gunpowder are subject to any duty on importation.

The magistrate convicted the appellant, having regard to the meaning of the word importer as defined by the 8th section of the Customs Amendment Act, 1859, 22 & 23 Vict. c. 37, and considering that the same definition must be applied to the term "if any person shall cause to be imported" used in the 6th section of that act, and stated this case for the opinion of the Court, whether under the circumstances, his decision was right in point of law.

Holker, for the appellant. First, this was not a case in which goods of one denomination were concealed in goods of another denomination. The act relates to, and is for the protection of, the customs, and by goods of one denomination are meant goods subject to one duty. This is shewn by the latter part of the 6th section, which speaks of "goods subject to a higher rate or amount of duty than those of the denomination by which such package was entered," and shews what is the nature of the offences which the section is intended to prevent. The act of concealing one kind of goods which are duty free in another kind of goods also duty free, is not an offence against the customs, but only against the persons carrying the goods, who might be unwilling to carry

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them if they knew what they were. If every concealment of one kind of goods in another were illegal, the importers of adulterated articles would be liable to the penalty.

[ERLE, C.J. Adulterated articles do not change their denomination.]

At any rate, a stone placed in a bale of cotton to render it heavier would make the importer liable to the penalty.

Secondly, the appellant did not cause the goods to be imported within the meaning of the section. In consequence of the difficulty of determining who was liable to pay the duty as importer, the 8th section was passed, making any person beneficially interested in the goods liable as the importer. If the 6th section had been intended to render all persons beneficially interested in the goods liable to the penalties, the shorter phrase—the importer—would have been used; but the person who has caused them to be imported is specially singled out, and with good reason, because he, and he only, will be necessarily cognizant of the fraud. If the interpretation of the magistrate be correct, Messrs. Dunkerley and Steinmann are equally liable to the penalty.

Thirdly, this is a highly penal clause, and can only be considered to apply to those who intentionally do the act prohibited. Here there is no evidence that the appellant was at all aware of the existence of the gunpowder in the casks till the 17th, when they had already been shipped on board the steamer: the offence, if any, was committed without his knowledge or connivance.

Locke, Q.C. (*T. Jones* with him), for the respondent. The 6th section refers to two distinct offences, and it is clear that the first has no reference to the amount of duty paid by the articles.

[ERLE, C.J. You need not argue that point further.]

Then, did the appellant cause the goods to be imported? The goods were consigned to Dunkerley & Steinmann only as agents, and were to be at the disposal of the appellant; it was he who directed that they should be passed through the custom house, and he said in his letter of the 16th of December that he would direct where they should be sent to: there can be no doubt, therefore, that in fact he did really cause them to be imported. Moreover, the case finds that he did import, though the magistrate says that he found this in consequence of the 8th section.

Holker, in reply. The question left to the Court is one of law only, and the case nowhere finds that the appellant was the importer of the goods in any sense, except that given in the 8th section.

ERLE, C.J. The conclusion of law stated by the magistrate has not my concurrence. That conclusion is, that "importer" in the 8th section is the same as "the person who has caused to be imported" in the 6th. I think that "importer" in the ordinary sense of the word would signify the same class of persons as are referred to in the 6th section, but that many persons come within the definition of "importer" given in the 8th section who do not "cause the goods to be imported" within the meaning of the 6th. Thus, if I bought any goods after they had been brought into this country, but before they had passed through the custom house, however innocently I might do so, I should be an importer within the meaning of the 8th section, though I certainly should not have caused them to be imported. I think that the finding of the magistrate, that the appellant caused the goods to be imported, is only a finding that he was an importer within the meaning of the 8th section; and I propose, therefore, to send the case back to him to say whether he was of opinion that the appellant had in fact caused the casks to be imported. If the appellant ordered them to be sent, or had been in communication with Ehrenberg before they were sent, and the two co-operated in the importation with a mutual knowledge that the gunpowder would be concealed in the casks, he is liable to the penalty, and the conviction ought to be affirmed; if not, the conviction must be quashed.

MONTAGUE SMITH, J. I understand that the magistrate has asked us whether he was right in point of law in considering that the words "caused to be imported" in the 6th section were to bear the meaning given to the word "importer" by the 8th section. I think that the words "has caused to be imported" are to be read in their fair and ordinary sense, and not in the arbitrary sense given to "importer" in section 8. I think, therefore, that in point of law the magistrate was wrong, and I concur in thinking that the case should be sent back to him, not that he may hear

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fresh evidence, but that he may state whether at the time of the conviction he was or was not satisfied that the appellant had in the ordinary sense of the words caused the goods to be imported.

Case remitted accordingly.

Attorneys for appellant: *Gregory & Rowcliffes.*
Attorney for respondent: *The Solicitor of the Customs.*

June 31.

LONDON AND SOUTH WESTERN RAILWAY, APPELLANTS; REEVES, RESPONDENT.

Turnpike Acts—3 *Geo.* 4, *c.* 126, *s.* 32—*Public Stores.*

By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her Majesty's forces is exempt from toll.

A, a contractor for the supply of forage for the use of her Majesty's forces, delivered to B hay to be carried by him to one of the government stores in performance of A's contract, by the terms of which the deputy commissary-general had a right to reject it on its arrival if of inferior quality :—

Held, that the waggon in which B conveyed the hay was within the exemption.

CASE stated under 20 & 21 Vict. c. 43, by justices for the county of Hampshire.

The respondent was the collector of tolls at the Farnborough turnpike gate, and had demanded and taken toll from the appellants for a waggon and horses which were conveying hay to the commissariat stores at Aldershot for the use of her Majesty's forces. The hay had been delivered to the appellants by Messrs. Toomer Brothers, to be conveyed by them as aforesaid in pursuance of a contract made with her Majesty's deputy commissary-general for the supply of hay and other forage at Aldershot camp and command, subject amongst others to the following conditions:

"2. The contractor shall deliver the forage at his own expense, at such periods and in such quantities as may be required, into the stores or on the ground at Aldershot, or at Woolmer Forest, or wherever horses may be quartered or picketed within the command, as may be directed by the officers appointed for that duty.

4. The officer commanding may on application from officers commanding regiments or corps for their respective service, or whenever he may deem fit, appoint a brigade or additional board to inspect the supplies, and if the board shall be of opinion that they are not of the quality specified in the conditions they shall be rejected, and the officer of the commissariat may, without further appeal, purchase such supplies as may be required to replace those rejected as provided in clause No. 3.

16. A stock of oats, hay, and straw, sufficient for at least fourteen days' consumption for the number of horses actually in the camp and command shall be kept by the contractor; this stock shall be inspected and approved by the deputy commissary-general or other officers acting for him, and the issues to the troops shall be made from such supply in the order in which the same may have been inspected and approved. The deputy commissary-general, or other officers acting for him shall have full power and authority to reject any article offered which may appear to be of inferior quality, and in case of a proper supply of the respective articles not being immediately provided in lieu of these so rejected, or whensoever the stock of forage shall be less than the fourteen days' supply prescribed, the deputy commissary-general, or other officer acting for him, shall have full power to purchase such quantities as may be thus rejected or deficient as provided in clause 3."

It was contended on behalf of the appellants, that the waggon and horses came within the exemptions from toll mentioned in the 3 Geo. 4, c. 126, s. 32. (1)

It was contended on behalf of the respondent, that they did not come within such exemptions.

The justices were of opinion that the waggon and horses were not within the exemptions, and stated this case for the opinion of the Court whether their decision was right.

(1) 3 Geo. 4, c. 126, s. 32, enacts that "no toll shall be demanded or taken by virtue of this or any other act or acts of parliament on any turnpike road . . for any waggon, wain, cart, or other carriage whatsoever, or the horse, or horses, or other cattle drawing the same, employed in conveying any ordnance, or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, or returning empty from having been so employed."

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C. W. Wood, for the appellants. Two points were made by the respondent: first, that there being a right to reject the stores if not according to the contract, they were not stores "of or belonging to her Majesty" till they had been inspected and approved; and, secondly, that the waggon and horses, not belonging to the contractors themselves, but being used by the appellants in the course of their ordinary business as carriers, had no claim to the privileges which were given for the benefit of her Majesty to enable contractors to supply the forage cheaper. It is clear, however, that the right to reject goods, if not according to contract, does not prevent the property having passed to the purchaser; and moreover the words of the section are "of or belonging to her Majesty, or for the use of her Majesty's forces." Neither can it make any difference to whom the waggon belonged, the act providing that no toll shall be charged for *any waggon* employed in conveying public stores for the use of her Majesty's forces.

No counsel appeared for the respondent.

ERLE, C.J. I am of opinion that the decision of the justices was wrong. By 3 Geo. 4, c. 126, s. 32, stores being sent for her Majesty's use are free from toll, and these were stores being delivered for her use. It is clear that the fact that her Majesty can refuse to receive the stores if of inferior quality, cannot prevent their being her property, and it is also clear that the contractor may hire any one he pleases to convey them to the place where they are to be delivered, who will have all his privileges, as the delivery will still be in fact his own, on the principle qui facit per alium facit per se.

3 C. P. 64

BYLES and MONTAGUE SMITH, JJ., concurred.

Decision reversed.

Attorney for appellants: *L. Crombie.*

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May 22.

Husband and Wife—Action for Necessaries supplied to the Wife—Finding of the Jury in a Suit in the Divorce Court—Estoppel.

In an action for necessaries supplied to the wife of the defendant whilst living apart from him, the defendant relied for defence upon the adultery of the wife, to establish which he put in the proceedings in a suit against her in the Divorce Court, in which it was found by the jury that she had been guilty of adultery with the co-respondent, but in which there was no decree, the jury having also found that the petitioner had committed adultery:—

Held, that, there being no judgment in the Divorce Court altering the status of the parties, the proceedings therein afforded no defence to the action.

Semble, that such a judgment or decree would be admissible under "never indebted."

THIS was an action to recover the value of necessaries supplied by the plaintiff to the wife of the defendant whilst living apart from him.

The cause was tried before Forsyth, Q.C., in the Mayor's Court, London. The answer set up by the defendant, under never indebted, was, that the agency of the wife was destroyed by the circumstance of her having in a suit in the Divorce Court been found guilty of adultery. The proceedings in the suit were put in. From these it appeared that the adultery of the wife with the co-respondent had been established, but that there was no decree of dissolution of marriage, by reason of the finding of the jury that her husband also had been guilty of adultery. The cause of action accrued after that suit.

Upon this state of facts, the learned judge directed the jury to find for the plaintiff for the amount claimed, 20*l.* 7*s.*, reserving leave to the defendant to move to enter a verdict for him if this Court should be of opinion that the wife's adultery was an answer to the action.

H. James, in Easter Term last, obtained a rule nisi. He referred to the notes to *The Duchess of Kingston's* case. (1)

Nasmith shewed cause. The proceedings in the suit in the Divorce Court are not conclusive as an estoppel, or even as evidence

(1) 2 Sm. L. C. 5th ed. 663 et seq.

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against a stranger, and the estoppel should at all events be pleaded. He referred to Stephen on Pleading (1); Roscoe's Evidence (2); *Outram* v. *Morewood* (3); *Hannaford* v. *Hunn* (4); and *General Steam Navigation Company* v. *Guillou.* (5)

H. James was called upon to support the rule. The decree in the Divorce Court finding that the wife had been guilty of adultery, being a judgment in rem, is conclusive against the wife, and against all claiming through her. The defendant had no opportunity of pleading the estoppel in the Mayor's Court; the question arises upon the evidence. The cases upon the subject are all collected in *The Duchess of Kingston's* case. (6) In the notes to that case in Smith's Leading Cases (7), after observing upon the effect of judgments in the Courts of Chancery and Courts Ecclesiastical, the learned editors say: "On the same principle, a sentence in a matrimonial suit is conclusive, for it is an adjudication upon the status of the parties: see *Da Costa* v. *Villa Real* (8); *Bunting's* case (9); *Kenn's* case (10); *Meddowcroft* v. *Huguenin* (11); *Perry* v. *Meddowcroft* (12): and see the instances of sentences of deprivation collected by Lord Holt in his judgment in *Philips* v. *Bury.* (13) But it is otherwise when the suit is for a jactitation of marriage; for there the spiritual court does not intend to affect the status of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances." The only difference between the cases there put and the present is, that there there was a decree of divorce, and here only a judgment that adultery had been committed. There is nothing in the Divorce Acts (14) to shew what is the precise effect of such a judgment. But it is submitted that, as regards the wife's power to bind her husband by her contracts, it has all the effect of a sentence of divorce. The fact of the husband having committed adultery also does not affect the wife's guilt.

(1) 5th ed. 173.
(2) 10th ed. 157, 167.
(3) 3 East, 346.
(4) 2 C. & P. 148.
(5) 11 M. & W. 877.
(6) 2 Sm. L. C. 5th ed. 663 et seq.
(7) Vol. ii. 5th ed. 676.
(8) 2 Stra. 961.
(9) 4 Co. Rep. 29 *a*.
(10) 7 Co. Rep. 42 *b*.
(11) 4 Moore's P. C. 386.
(12) 10 Beav. 122.
(13) 2 T. R. 346.
(14) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108.

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ERLE, C.J. I am of opinion that this rule should be discharged. The judgment of the Divorce Court has not altered the status of the parties. The woman still continues the wife of the defendant. The case does not fall within the class of cases referred to, where the sentence put an end to the relation of husband and wife. There is nothing here but the mere verdict of a jury, binding as between the parties to the suit, but not as against other parties who come to litigate the same question.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorney for plaintiff: *A. J. Miles.*
Attorneys for defendant: *Matthews, Carter, & Bell.*

GREENBERG *v.* WARD AND ANOTHER. *May* 25.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134)—*Composition Deed—Reasonable Provisions.*

A composition deed, under the Bankruptcy Act, 1861, provided—first, that the trustees should be at liberty to sell any of the property to the debtors on credit, with or without security; secondly, that no former dividend should be disturbed, and no liability in consequence of such dividend incurred by the trustees, by reason of any debt due to any creditor, whereof the trustees should not have had notice before such dividend should have begun to be paid:—

Held, reasonable provisions.

DECLARATION for goods bargained and sold, and on a bill of exchange.

Plea setting out a composition deed under the Bankruptcy Act, 1861.

The deed was made between the defendants of the first part, trustees for the creditors of the second part, and the several other persons whose names or the names of whose firms were written in the first column of the schedule thereunder written, being respectively creditors or claiming to be creditors, of the third part; and by it the defendants conveyed all their property to the parties of the second part, "in trust to sell and dispose of, and realise or collect and receive the said premises thereby conveyed and

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assigned as thereinafter mentioned and expressed, and intended so to be, and every part thereof, by public sale and private contract, and in one or more lot or lots, with liberty to sell the same on credit to the said debtors or either of them, or any other person or persons, with or without security for the purchase money, or any part thereof as should seem expedient; and upon trust out of the moneys to be received by those presents to pay all costs and expenses of investigating on the part of the creditors the affairs of the said debtors, and of proposing, preparing, and executing those presents and of or occasioned by the carrying into effect the trusts thereby created; and in the next place (so far as the same might extend) to pay, retain, and satisfy rateably and without preference, administering the assets and distributing joint and separate estates in like manner as in bankruptcy, except in any case where the contrary might be thereby provided for, to and amongst the parties thereto of the third part, including themselves the said trustees, and their partners (if any) so far as they might be creditors as aforesaid, and including all the creditors of the debtors, the several debts and sums due to such creditors respectively accounting such creditors in respect of such amount only as upon account fairly stated, after allowing according to the provisions of the bankruptcy law, the value (if any) of mortgage securities, and other such available securities or liens, as should appear to be the balance due to them respectively from the debtors, subject to the covenant thereinafter contained for verifying the amounts thereof, and to pay the ultimate residue (if any) of the said moneys after satisfying the whole of the said creditors the full amount of their said debts, with interest thereon, unto the said debtors, in like manner as in bankruptcy. Provided always that no former dividend should be disturbed, and no liability in consequence of such dividend should be incurred by the trustees by reason or on account of any debt or debts due to creditors as aforesaid, and whereof the trustees should not have had notice before such dividend should have begun to be paid." The remainder of the deed was immaterial to the present argument.

Demurrer and joinder.

Field, Q.C. (*Holl* with him), in support of the demurrer. The

deed is bad on two grounds: First, the provision enabling the trustees to sell the whole or any part of the property to the debtors on credit and without security is an unreasonable provision. It enables the trustees to defeat the whole purpose of the deed. Secondly, the provision that no former dividend shall be disturbed by reason of any debt of which the trustees had no notice at the time it was paid, will in fact exclude from the benefit of the deed such creditors as do not give notice of their debts to the trustees; and the deed therefore does not distribute the effects of the debtors equally among all the creditors.

Quain, in support of the plea. If the trustees proposed to sell the goods improvidently to the debtors, they would be restrained by the Court of Bankruptcy; and the provision is really a very beneficial one, as the debtor is often willing to give a better price for the goods than any one else, if he is able to obtain money for the purpose from his friends. The case, moreover, is concluded by *Coles* v. *Turner*. (1) There, a clause enabling the trustees to sell the property on credit, with or without security, was held a reasonable provision, though it was suggested by counsel that it would enable the trustees to sell the property without security to the debtor himself. As to the second point, such a provision as that objected to is in accordance with the practice of the Court of Bankruptcy itself: *Broadbent* v. *Thornton* (2): there, the trustees knew of the debt, and yet it was held that the creditor was not entitled to disturb dividends already paid.

Field, Q.C., in reply. If the debtors had friends who were willing to pay, they could give security or ready money; the object of the clause, therefore, must be that the trustees may restore the goods to them at once on the chance of their paying for them. In *Broadbent* v. *Thornton* (2) the creditor knew of the deed and lay by, and so was guilty of laches, and lost his right to participate in the dividend, but no such laches is contemplated here.

ERLE, C.J. I am of opinion that our judgment should be for the defendants. No doubt the deed gives great power to the trustees, and if they chose to conspire with the debtors they could defraud the creditors, and an application to the Court of Bank-

(1) Law Rep. 1 C. P. 373. (2) 4 De G. & S. 65.

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ruptcy might be necessary to restrain them. But we are not to presume that the trustees will commit a wilful breach of trust. I think, too, we are concluded by the case of *Coles* v. *Turner* (1), for the same power was contained by implication in that deed. Then, as to the clause prohibiting a person whose debt was unknown to the trustees at the time when a dividend was paid from disturbing such dividend—if the trustees do their duty, and allow a reasonable time for the creditors to come in, there will be no hardship; and if they were not to do so, it would be a breach of trust, of which we are not to presume that they would be guilty.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.

Attorneys for plaintiff: *Miller & Miller.*
Attorney for defendants: *R. Bastard.*

May 30.

IN RE PALMER AND THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Carriers by Railway—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 3—*Undue Prejudice—Collection of Parcels.*

A collected parcels, and forwarded them by railway; the railway company refused to admit A's vans into their station after 6·30 P.M., but admitted their own vans and those of B at a later hour with parcels, which they forwarded the same night. The time (6·30 P.M.) fixed by the company, as that after which they would not receive goods to be forwarded the same night, was reasonable. The company in admitting their own vans later acted bonâ fide, and not with the intention of gaining an undue advantage over other collecting carriers; they admitted B's vans in consequence of an injunction obtained by him.

In two similar cases—*Garton* v. *Bristol and Exeter Railway Company* (2) and *Baxendale* v. *South Western Railway Company* (3)—injunctions, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3, had been granted by this Court to restrain those companies from admitting their own vans into their station with goods to be despatched the same night at a later hour than those of other persons. On an application by A for a similar injunction against the present defendants:—

Held (by Erle, C.J., and Montague Smith, J.), that, the exercise of this special jurisdiction by the Court being subject to no review, and depending in each

(1) Law Rep. 1 C. P. 373. (2) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.
(3) 12 C. B. (N.S.) 758.

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instance on the special facts of the case, cases previously decided under it are not binding on the Court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate; and that it ought not to be granted.

Held (by Willes and Keating, JJ.), that the above cases were precedents binding on the Court, and also were rightly decided; and that the injunction ought to be granted.

THIS was a rule calling on the London and South Western Railway Company to shew cause why an injunction under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), should not issue, restraining them from unduly prejudicing the applicant, and giving undue preference to themselves and Messrs. Baxendale, by refusing to receive at the Nine Elms station, after 6·30 P.M., goods collected by the applicant, and by receiving at a later time goods collected by themselves and Messrs. Baxendale. The rule was obtained on the authority of *Garton* v. *Bristol and Exeter Railway Company* (1) and *Baxendale* v. *London and South Western Railway Company*. (2)

H. S. Giffard, Q.C., and *C. W. Wood*, shewed cause.

H. James and *Eyre Lloyd* supported the rule.

The effect of the affidavits relied on upon both sides, and the arguments, are fully stated in the judgment of Erle, C.J.

Cur. adv. vult.

May 30.] The following judgment was delivered by

ERLE, C.J. This was an application for an injunction against undue prejudice; and the affidavits on the part of the applicant shew that he and the railway company and Messrs. Baxendale are collecting carriers, collecting goods to be forwarded by the railway; that the gates of the company's station at Nine Elms are closed at 6·30 against the public in general; that the vans of the applicant arriving after that hour have been frequently excluded; and that the vans of the railway company and of Messrs. Baxendale arriving after that hour have been constantly admitted, and the goods forwarded on the same evening.

The affidavits in answer shew, first, that the company contract

(1) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306. (2) 12 C. B. (N.S.) 758.

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to deliver at its destination before morning each and every consignment received into the station before 6·30, and that there is good reason for fixing that hour for the limit of receipt under that contract; and, secondly, that some goods are received into the station after 6·30, and forwarded the same night, and that in so doing the company act rightly both in respect of their own interest and of their duty to their customers.

As to the first point, viz. that there is good reason for fixing the hour of 6·30 as the limit of receipt under the contract, the affidavits of the officers of the company state, that the traffic is managed in the manner best adapted to secure for all the public in the utmost degree safe and cheap accommodation, without any partiality; that there are daily from Nine Elms twenty-nine goods trains, with seven hundred and twenty railway-trucks, carrying one thousand tons, and that five hundred and twenty-five road vans arrive daily at that station; that arrangements must be made for delivering this amount of traffic every night among two hundred and fifty stations; that, for the first train, at 10·35, there were in April two thousand four hundred consignments each day; that each consignment had to be received, weighed, carried from the scales, sorted, loaded on hand-trucks, conveyed to railway-trucks, entered on truck-lists, loaded into trucks, and invoiced; that this process for the first goods train for the more distant stations in North Devon has to be repeated in a degree for the goods trains succeeding each other at half-hour intervals till 3 A.M. for the nearer counties; that the line must be drawn at some point to limit the contract of the company to forward in the course of the night; and that 6·30 is the latest practicable time for the receiving of goods with a contract so to forward them; that the outgoing trains are to be arranged, not only with reference to their own safety, but also with reference to the in-coming trains, when an analogous process is to be repeated for distributing goods arriving in London; that the hour for contracting to forward the same night must be fixed with reference, not only to great differences in the quantity of traffic to which the contract would apply on different nights, but also to great differences in the purposes of the consignors.

These being the facts relevant to the time of closing, I think

that the directors had good reason for fixing on 6·30 as the latest time for receiving goods under the contract; and that this Court ought not to compel the company to incur the risk of numerous breaches of contract, and of numerous collisions, by interfering with the complex arrangements in subordination to each other above described.

As to the second point, that some goods are received into the station after 6·30, and forwarded the same night, the affidavits in answer shew that this is done by right, and according to duty, the company having a right to forward goods at any time, and a duty to forward them at all times without delay. When the contract is to attach there must be a limit of time, and the party claiming to come in under that contract must comply with that limit; and, as the applicant claims that his goods should be received and forwarded under the contract, they are properly excluded when not within the time limited for the contract.

With respect to the charge that goods are received after 6·30, and forwarded the same night, so far as the complaint is general the answer must be equally general; and it shews classes of cases where the facts complained of are done lawfully and properly, without causing undue prejudice to any one.

Thus, it appears that the general rule above mentioned for closing the gates at 6·30, and excluding vans after that time, is subject to exception, at the discretion of the superintendent, according to circumstances, such as goods for shipment on a ship about to sail, perishable goods, accidental delays on the road, and the like; and that the complainant has had the benefit of this exception impartially with all other customers.

Thus, also, with respect to admitting some of the vans of the railway company after 6·30, it appears that there are thirty-seven receiving-houses, and several carmen collecting from several receiving-houses lying in several lines from the circumference of collection towards the centre several times in a day, and that the last collection begins at the circumference at 4·30, and, as the quantities vary, each carman is detained more or less as he approaches the station, and so is often admitted after 6·30, and the goods are then forwarded as far as can be conveniently done: and it further appears that in several receiving-houses goods are sorted

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and weighed and invoiced and made fit for immediate forwarding, which cannot be done by a stranger to the company; and that there is reason for admitting vans so loaded from those houses at a later hour, and forwarding those goods for these receiving-houses. The goods for the earliest trains may be sorted from the goods for the later trains, and sent forwards according to the station in time for performing the contract as to those goods: but this species of sorting must be done by agents for the company, as a mistake in sorting would make them liable for a breach of contract.

These being the facts, and 6·30 being shewn to be the proper hour for closing, in reference to the contract, if this rule is made absolute, it must be in effect for an injunction against forwarding any goods at all that are received after 6·30. The consequence of such an injunction would be, that the applicant would have a contingent possibility of being employed to cart some of the goods now carted by the railway company, that is, in case the consignors of such goods were induced by reason of the delay to consign to the railway through him instead of to the railway direct. On the other hand, the consignees of all the goods detained would suffer twenty-four hours' useless delay, the railway company would have to warehouse those goods for twenty-four hours, and the complex arrangement above described would be disturbed.

As to receiving goods after 6·30, all parties are at liberty to receive at the receiving-houses at all hours any goods. The only question is in respect of the obligation to forward. That obligation only attaches where the contract attaches. But, where the contract does not attach, still the company has, and ought to have, the option of forwarding goods at any time, and violates no right in doing so.

The affidavits filed on behalf of the company are positive, that the vans admitted after 6·30 are so admitted without any partiality or improper motive; and I see no reason for disbelieving them.

If we granted an injunction against forwarding in the night any goods unless received at the station before 6·30, we should defeat the purpose of the statute under which we are acting; as that statute, s. 2, enacts that every railway shall afford all reasonable facility for receiving, forwarding, and delivering traffic on their railway. The proposed injunction would, as it seems to me, cause a violation of the duty thus created, if it caused useless delay.

So the matter would have stood, in my judgment, if it had been res integra. But it is said that we are concluded by authority, and that the cases of *Baxendale* v. *London and South Western Railway Company* (1), and *Garton* v. *Great Western Railway Company* (2), are in point. In answer to this, I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact depending on the matters proved in each case.

The legislature intended by the Railway Traffic Act to facilitate the transport,—that is, the receiving, forwarding, and delivering,—of traffic; and for the purpose of promoting such facility, gave to this Court a discretionary power over all the operations of railway companies relating to transport of traffic, by issuing an injunction against undue prejudice: and, as the terms "undue prejudice" are unlimited, any operation may be within them; so that the power is in effect arbitrary, and is not subject to any review either in respect of the questions of fact or law. The injunction is a severe infliction as a censure, as a fine in the shape of costs, and as an interruption in the conduct of a very complicated and important business; the directors being subject to imprisonment, and the company being liable to a fine not exceeding 200*l.* per day, for disobedience to an injunction: also it is a procedure in which the railway company can never gain anything, and must always lose something in the shape of costs.

The legislature, assuming that some directors would suppose themselves to be above the control of the law, seem to have created this anomalous jurisdiction to bring them down to the level of the law, in case of need; and entrusted such power to this Court, in the confidence that the rights of railway companies under the law would here be securely protected.

In exercising this jurisdiction, and granting an injunction, it seems to me that the Court has to consider the conflict of affidavits, and to ascertain therefrom what is the complaint, whether the public have any interest in it, and whether any fair interests of the railway company are involved in it, and whether the directors in-

(1) 12 C. B. (N.S.) 758.
(2) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.

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tentionally violate their duty towards the public, or their company, or the complainant.

I recite these considerations, for the purpose of supporting my opinion that the grounds for this extraordinary interference must in each instance in their nature be almost singular, and can scarcely ever afford any guidance for deciding a subsequent application for an injunction. In confirmation of this opinion, I rely upon the course taken by this Court in granting an injunction against the company at the suit of Messrs. Baxendale. I concurred in that decision, because I considered myself bound by the precedent in *Garton* v. *Great Western Railway Company*. (1) In each case the gates of the goods station had been closed against the public in general at a fixed hour, and the vans of the company were supposed to be admitted after that hour; and, as such admission was decided to be an undue prejudice to Mr. Garton, this Court was induced to decide that an admission of the vans of this company (the South Western Railway Company) was also an undue prejudice to Messrs. Baxendale.

On the authority of these two cases, Mr. Palmer now moves for another injunction; and I have been thus obliged either to grant every such application or to reconsider the question of authority; and I have come to the conclusion that it ought not to bind in the manner that a precedent in law binds.

I do not presume to discuss the merits of Mr. Garton's case, as I was not a party to it. I assume that it must have been properly decided: but still it is not a precedent that must be always followed wherever the vans of a company are admitted into a station after it is closed against the public. I do not know whether in Garton's case the affidavits of the officers of the company were disbelieved, and the motives of the directors discredited, or whether the interests of the collecting carrier were considered of more importance to the public than the interest of the railway company. Such considerations appear to have had weight with the Court in some of the cases against the Great Western Railway Company. (2)

(1) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.

(2) His Lordship probably alluded to *Baxendale* v. *Great Western Railway Company* (Bristol Case), 5 C. B. (N.S.) 309; 28 L. J. (C. P.) 69: and *Baxendale* v. *Great Western Railway Company* (Reading Case), 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

None of these considerations appear to me to be relevant against the directors of this company. In my opinion, they have done their duty in the conduct of their business, and ought not to be interfered with on the complaint now before us.

I am further confirmed in this view by the consequence of the injunction granted at the suit of Messrs. Baxendale. I thought at the time it was granted that the defendants had been doing their duty in a proper manner; nevertheless, the injunction went, on authority: the consequence has been, that the company, in supposed obedience thereto, have submitted to the will of Messrs. Baxendale, and appear to have admitted their vans at all hours. This admission of Messrs. Baxendale's vans appears to have induced Mr. Palmer to claim a similar admission, and would be a ground for the admission of everybody, if precedent was to be followed. But it is certain that we ought not to follow any precedent, if in so doing we should defeat the intention of the legislature, as above described. That intention was declared to be to facilitate the transport of the traffic. It seems to me that the injunction now applied for, that is, an injunction against closing at 6·30, or against forwarding after 6·30, would, in its practical operation, prevent the railway company from forwarding on the same night any goods which arrived at the station after 6·30, and would therefore be a hindrance instead of a facility to transport, and so would be contrary to the interest and convenience of the public. Such an injunction might be the source of private profit to Mr. Palmer: but he has no right to demand that the interests of the public or of the railway should be sacrificed for his private gain. For these reasons, I think that the rule should be discharged.

My Brothers Willes and Keating are of opinion that the precedents which would entitle the applicant to judgment bind the Court, and moreover that they are right.

My Brother Montague Smith concurs in the opinion I have expressed.

As the Court is thus divided, the rule drops.

Rule dropped.

Attorneys for complainant: *Innes & Son.*

Attorney for company: *Lewis Crombie.*

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June 2.

SCOTT *v.* UXBRIDGE AND RICKMANSWORTH RAILWAY COMPANY.

*Tender—Scire Facias against a Shareholder of a Railway Company—Costs after Judgment—*8 & 9 *Vict. c.* 16, *s.* 36.

An offer to pay, under protest, the sum claimed is a good tender.

A creditor, having obtained a judgment against a railway company, gave notice to a shareholder that he was about to apply for leave to issue a scire facias against him, and the shareholder thereupon tendered, under protest, the whole sum claimed, which included 150*l.* for costs incurred since the judgment; but the creditor refused it, and obtained a rule nisi for a scire facias:—

Held, that the tender was good, and ought to have been accepted by the creditor; and the Court discharged the rule with costs, without prejudice to another application, if the sum claimed, minus the 150*l.*, were not paid.

THIS was a rule calling on B. to shew cause why a writ of scire facias, on a judgment obtained by the plaintiff against the Uxbridge and Rickmansworth Railway Company, should not be issued against him as a shareholder of the company, to enable the plaintiff to have execution on the judgment to satisfy the residue unpaid on such judgment amounting to 1652*l.* 14*s.* 8*d.*, to the extent of B.'s shares in the capital of the company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36.

It appeared from the affidavits that the plaintiff had obtained judgment against the company for 1646*l.* 2*s.* 2*d.* debt, and 6*l.* 12*s.* 6*d.* costs, and had issued several executions, and realised only 80*l.* Thereupon the plaintiff's attorney served a notice on B. who held 400 shares in the company, that 1572*l.* 14*s.* 8*d.* remained unsatisfied on the judgment, and that application would be made for a scire facias against him as such shareholder. B.'s attorneys opened negotiations with the plaintiff's attorney for the payment of the amount due in order to prevent litigation. The plaintiff's attorney stated his claim to be 1596*l.* 3*s.* 6*d.*, made up as follows: 1652*l.* 14*s.* 8*d.* amount of judgment; 72*l.* 19*s.* interest; credit being then given for the 80*l.*, and for 200*l.* since paid by a shareholder; 150*l.* costs (these were incurred since the judgment), and 9*s.* 10*d.* further interest. On the receipt of this B.'s attorneys wrote:

"We do not understand the account you have sent us, which seems inconsistent with the notice. We must also request you to

be good enough to furnish us with the particulars of the costs charged in a lump sum of 150*l.* Our client will not of course pay more than he is legally liable for. If you insist upon being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a cheque this morning for the amount (1596*l.* 3*s.* 6*d.*), but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards."

In accordance with this letter, a cheque for the full amount claimed was tendered to the plaintiff's attorney, but he refused to receive it, unless the letter was withdrawn or he was allowed to state in his receipt that he received it not under protest.

Karslake, Q.C. (*Horace Lloyd* with him), shewed cause. The tender was a good one. The protest did not make it in any way conditional, and was necessary to preserve the rights of the person making it. The sum demanded by the plaintiff was clearly too large, as he is not entitled under the scire facias to recover any costs subsequent to the judgment. The scire facias must issue on the record, and there is no record of the execution or other proceedings subsequent to the judgment. The Court will not allow a writ of sci. fa. to issue against a shareholder after payment has been offered, at any rate without a subsequent notice to him, which must state correctly the sum due from him.

C. W. Wood, in support of the rule. It must be conceded that probably the plaintiff is not entitled to recover the 150*l.* under the scire facias, as no doubt they were costs incurred since the judgment, but the plaintiff seeks under this rule not to recover a particular sum, but only to be allowed to take proceedings to ascertain what sum is due. The plaintiff was not bound to accept payment while it was clogged by any protest; and in any case, as the payment has not been made and the sum is still due, the Court is bound to grant the rule. The cases of *Hill* v. *London and County Assurance Company* (1) and *Morisse* v. *Royal British Bank* (2) shew distinctly that the power of the Court is not discretionary: see also Hodges on Railways, p. 84, n. o.

(1) 1 H. & N. 398: 26 L. J. (Ex.) 89.

(2) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.

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[WILLES, J. All that was meant in those cases was, that if the creditor has a just claim, the Court cannot refuse to enforce it.]

ERLE, C.J. This is a rule by a creditor who has recovered a judgment against a company, calling upon a shareholder to shew cause why a scire facias should not issue against him to enable the plaintiff to have execution upon the judgment. Now, the proceedings against a shareholder are proceedings that entail very considerable cost upon him, and the statute which authorizes us to give the plaintiff the remedy he seeks imposes upon us the duty of seeing that the process of the Court is not abused by him; and I am clear that the party seeking this remedy ought to enable the shareholder to pay everything that is due, and ought to enable the shareholder to know what that sum is. Now in this case the original judgment was for 1652*l.* 14*s.* 8*d.*, and the residue unpaid is the sum demanded by the rule; but I rely upon the statement between the attorneys to the two parties. The attorney for the creditor made out his statement of the demand as 1596*l.* 3*s.* 6*d.*, including 150*l.* for costs; the attorneys for the shareholder offered to pay that sum under protest, and the attorney for the creditor refused to receive it under protest. Now, I am clearly of opinion that the shareholder being called on in these legal proceedings to pay the debt that is claimed from him, has a right to stop these legal proceedings by payment, and the payment is just as valid when made under protest as when made without protest. The shareholder has a right to say: "I will stop the proceedings by paying the money, but I protest it is more than I am bound to pay;" and by putting in that protest he preserves to himself recourse to any just right which the law gives him; and in this case the shareholder might well say so, because in the creditor's demand there was a claim for 150*l.* costs, to which, as at present advised, I think he was not entitled. The parties have stood on their respective rights. They have resorted to this rule, which is a rule we are bound to make absolute, or discharge, according to the real rights or interests of the parties, and in my opinion we are bound to discharge it, because the shareholder was willing to have done that which would have stopped the necessity for these proceedings, and the plaintiff has therefore come here without cause.

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WILLES, J. I am of the same opinion. I think Mr. Wood was perfectly right in conceding that the plaintiff was not entitled to recover under this process the 150*l.* costs incurred since the judgment. The shareholder's attorneys, however, do not seem to have expressed any opinion on that point, but in order to avoid the present litigation tendered to the plaintiff all that he claimed under protest. Now, if they had simply tendered all that he claimed, and it had been refused, it must be admitted that this application could not have been supported, because it would have been an abuse of the process of the Court to apply for or act upon such a rule by issuing a scire facias under such circumstances. The case, therefore, may be decided on the question whether there was a valid tender. The question is one of general importance, whether a debtor tendering an amount which he is satisfied to pay rather than be sued for it, may guard himself against an admission that the claim is a just one, so as to put himself in a position to take further proceedings to test the justice of the claim, by adding the words "under protest" to his tender, and tendering under protest. It is quite obvious that he may. I think that the protest imposes no conditions on the tender. The creditor has only to say, "I take the money; protest as much as you please," and neither party makes any admission. Whereas if the debtor were not allowed to use some such expression on paying the money, there would be from his silence an implied admission that the claim on him was a just one; and that, in the case of a disputed claim against a person anxious to avoid litigation, might lead to very unjust consequences. I entirely concur in the law and good sense of the ruling of Pollock, C.B., to that effect, in the case of *Manning* v. *Lunn.* (1) The tender being a good one, these proceedings were unnecessary, and therefore I think the rule ought to be discharged.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion. The protest cannot affect the validity of the tender. If the claim is rightly made and can be legally sustained, the words of the protest used by the debtor on paying cannot in the slightest degree affect the creditor; whereas if the claim is not well founded or is excessive,

(1) 2 Car. & K. 13.

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the debtor might be compromised in paying it unless he added those words.

Karslake, Q.C., applied for costs.

ERLE, C.J. The rule will be discharged with costs, but without prejudice to another application, if the sum claimed, minus the 150*l.*, be not paid.

Rule discharged.

Attorney for plaintiff: *A. Dobie.*

Attorneys for shareholder: *Young, Maples, & Co.*

June 4.

GRILL *v.* THE GENERAL IRON SCREW COLLIER COMPANY (LIMITED).

Ship and Shipping—Bill of Lading—Barratry—Perils of the Sea—Gross Negligence—Depositions under a Commission—Admissibility of Evidence—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 299.

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), was not intended to alter the relation between shipowners and shippers, and the 299th section, which provides that a loss arising from the nonobservance by a ship of the rules laid down by the act shall be deemed to have been occasioned by the *wilful* default of the person in charge of the deck, does not render a breach of the rules barratry, unless it was intentional.

A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in a bill of lading.

Therefore, where a shipowner, by a bill of lading, undertook to deliver safely certain goods "barratry of master or mariners, accidents, or damage of the seas, rivers, or navigation, of whatever nature or kind soever, excepted," and the ship came into collision with another, in consequence of starboarding her helm, in contravention of the rules of the Merchant Shipping Act, 1854, then in force, and sank, and the goods were lost:—

Held, that the shipowner was liable for the value of the goods.

Gross negligence is a relative term, and means the absence of the care that was requisite under the circumstances.

Therefore, where a replication alleged that the collision by which the goods were lost occurred through the gross negligence of the defendants, and the judge did not ask the jury whether the defendants had been guilty of gross negligence, but left it to them to say whether the defendants had exercised due care in the conduct of their ship:—

Held, a right direction.

In an action on a bill of lading for the nondelivery of goods lost by the defendants' negligence, the judge left it to the jury to say whether the collision, by which

the loss was caused, was occasioned by the negligence of the defendants. There was no evidence whatever that the loss of the goods could have been prevented if the collision took place:—

Held, that the question to be decided was, whether the loss of the goods, and not whether the collision, was caused by the negligence of the defendants; but that, considering the evidence, there was no misdirection.

Any irregularity in the mode of taking depositions under a commission should be the subject of an application at judges' chambers, and is not a ground for refusing to receive the depositions at the trial.

Therefore, where a commission having been issued to examine witnesses at M. by written interrogatories and vivâ voce, one of the witnesses named in the commission was not examined, and the examination was conducted entirely vivâ voce, the written interrogatories that had been prepared not being administered:—

Held, that if this was an irregularity, it could only have been taken advantage of by an application at chambers, and was no ground for refusing to admit the depositions at the trial.

Semble, that it was not an irregularity.

Affd in Ex Ch 2 B. & S. 476.

DECLARATION. That the defendants were the owners of a certain steam-vessel called the *Black Prince*, lying at anchor at the port of Messina, and bound on a voyage from that port to the port of London, and thereupon the plaintiff delivered to the defendants, and they received, certain goods of the plaintiff, to be by them shipped on board the said steam-vessel, and safely and securely carried therein from the said port of Messina to the said port of London, and there to be delivered unto order or to assigns, the act of God, the Queen's enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of princes and rulers, fire, accident, or damage from machinery, boilers, steam, or from other goods by contact, sweating, leaking, or otherwise, or accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever, excepted, he or they paying freight for the said goods in cash on ship's arrival, free of interest, at the rate of 50*s.* per ton of twenty hundredweights gross weight, with 15 per cent. primage and average accustomed: That the defendants were not prevented from so carrying or delivering the goods by any of the perils or casualties aforesaid; yet the defendants did not safely or securely carry or deliver the goods, but took such bad and improper care of their steam-vessel, and navigated and directed and managed the same in so careless, negligent, and improper a manner, that by and through the carelessness, negligence, mismanagement, and improper conduct of the defendants, by their servants

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and mariners on that behalf, the said steam-vessel with great force and violence ran foul of, and struck against a certain other steam-vessel, to wit, the *Araxes*, whereby the steam-vessel of the defendants and the plaintiff's goods on board the said vessel were sunk, and the goods of the plaintiff became wholly lost to the plaintiff.

Pleas. 1. Denial of the bailment. 2. Not guilty. 3. That the defendants were prevented from carrying and delivering the goods by the excepted perils.

Issues thereon; and a special replication to the third plea; that the supposed excepted perils in the third plea mentioned conisted wholly of the collision in the declaration mentioned, and that the collision arose, and was wholly caused, and the supposed perils were incurred by and through the gross negligence, carelessness, mismanagement, and improper conduct of the defendants by their servants and mariners in that behalf, and not otherwise, and that the defendants were not prevented from carrying and delivering the goods by the excepted perils, or any of them, further or otherwise than in the replication mentioned.

Issue thereon.

At the trial before Erle, C.J., at the sittings in London after Michaelmas Term, it was proved that the goods were shipped on board the *Black Prince* under a bill of lading containing the terms set out in the declaration, and that the *Black Prince* on the night of the 8th of November, 1860, came into collision with another steam-ship, the *Araxes*, and sank in consequence. It appeared that the two vessels were approaching nearly stem on, and the collision was caused by the *Black Prince* starboarding her helm contrary to the regulations of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 296, then in force, and there was no evidence to shew that there was any excuse for this breach of the regulations.

A commission had been sent out to Messina containing authority to the consul there "to examine upon interrogatories and vivâ voce, as hereinafter mentioned, witnesses on behalf of the plaintiff, upon oath or affirmation, according to their several religions, and that the plaintiff shall be at liberty to examine upon interrogatories, and also to put additional questions vivâ voce, to such witnesses as may be produced on his behalf, with liberty to the defendants to cross-examine upon cross-interroga-

tories and additional vivâ voce questions, such witnesses, and the plaintiff, upon such cross-examination, shall be at liberty to re-examine vivâ voce the said witnesses." Interrogatories and cross-interrogatories were prepared and sent out, and the defendants appointed Mr. Francis Tagliavia to act as their agent on the execution of the commission. The written interrogatories, however, were not used, but the witnesses were examined and cross-examined by Mr. Tagliavia vivâ voce. The depositions so taken were tendered and admitted in evidence at the trial.

The learned judge left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligence of the crew of the defendants, and whether it was proved that there was want of reasonable care on the part of the *Araxes* by the exercise of which the collision could have been avoided. The jury found specially that there was no want of ordinary care on the part of the *Araxes*, and there was negligence on the part of the *Black Prince*, which caused the collision; and they assessed the damages at 1220*l.*

A verdict was accordingly entered for the plaintiff for that amount, leave being reserved to the defendants to enter the verdict, on the ground that the conduct of the persons in charge of the defendants' ship brought the case within the exception of barratry in the bill of lading.

Edward James, Q.C., having obtained a rule to enter the verdict for the defendants, pursuant to the leave reserved; or for a new trial on the grounds that the judge ought to have told the jury that the loss was caused by peril of the seas within the meaning of the bill of lading; that he ought to have left to the jury whether the peril was caused by gross negligence; that he ought to have left to the jury whether the loss of the goods (and not the collision) might not have been avoided by care on the part of those on board the *Araxes;* and on the ground of the misreception of the depositions taken at Messina,

The Solicitor General (*Sir R. P. Collier*), *Hannen*, and *Cohen* shewed cause. The first question is, whether the acts of the master and crew of the *Black Prince* amounted to barratry. The defendants rely on the words of the Merchant Shipping Act, 1854, which

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was in force at the time, and which enacts (s. 299) that any breach of its regulations shall be considered as the wilful default of the person in charge of the deck. That this makes any breach of the rules barratry has never been suggested before, except in one case, though there have been very many cases which have been wrongly decided, if it be so, such as a case arising out of this same collision, *The Araxes* (1) and *Tuff* v. *Warman*. (2) The point was actually raised and decided in *The Seine* (3), where Dr. Lushington held that a mere breach of these regulations did not constitute barratry, and distinguished the case of *The Druid* (4), in which the captain intentionally ran his ship against another for the purpose of destroying it. The same distinction is referred to in *The Ida*. (5) Various definitions have been given of barratry. The subject is discussed in Arnould on Insurance (3rd ed. vol. ii. p. 711). Parsons in his work on Maritime Law (vol. ii. p. 239) defines it as "any wrongful act of the master, officers, or crew, done against the owner." In *Todd* v. *Ritchie* (6) Lord Ellenborough gives well the result of the decisions in the English courts when he says, "in order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment." No doubt illegal acts, such as trading with the enemy, are barratrous, even though done with the bonâ fide intention of benefitting the owner, as was decided in *Earle* v. *Rowcroft* (7), which will be relied on by the other side; but, except in such cases, fraud is a necessary ingredient in barratry: *Phyn* v. *Royal Exchange Assurance Company* (8); and as every master receives implied instructions to obey the laws of his country, it is, in fact, a breach of trust if he acts illegally, with whatever object: *Earle* v. *Rowcroft*. (7) There are, therefore, two classes of cases. If the act which occasions the loss was done with an intention which was plainly illegal, as in the case of trading with the enemy, then it is not necessary to shew that it was done with the intention of defrauding the owner; but if the act is ambiguous,

(1) 15 Moo. P. C. C. 122.
(2) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263. In error, 5 C. B. (N. S.) 573; 27 L. J. (C.P.) 322.
(3) Sw. Adm. Rep. 411.
(4) 1 W. Rob. Adm. Rep. 391.
(5) 1 Lush. 6.
(6) 1 Stark. 240.
(7) 8 East, 126.
(8) 7 T. R. 505.

and may have been done through ignorance, then the fraudulent intention must be proved, or the act will not be barratrous. The defendants rely on the words of the Merchant Shipping Act, 1854, s. 299. (1) These words are copied from several previous acts, the more recent of which are collected in Pritchard's Admiralty Digest, p. 147. Earlier acts had made the conduct of the person in charge of the vessel who broke any of the regulations a misdemeanour, and provided that "such master . . . should be subject in all proceedings, whether civil or criminal, to the legal consequences of such default": and this may have been the reason that the provision was first introduced that a breach of the rules should be considered the wilful default of the person in charge of the vessel. The effect of the 299th section seems to be that the act is not to be treated as a mere accident, but as the act of the person in charge of the ship, for which the owner is liable. It serves also to decide, in cases in which there is a pilot on board, whether he or the master of the vessel is responsible for the accident. It is exceedingly unlikely that the legislature intended, in a statute passed for the purpose of regulating the mode of navigating vessels, to alter the rights and liabilities of shipowners and shippers. At most the statute only declares that the master shall be considered to have intended to do the act, not that he shall be held to have intended to do the wrong involved in the act. Secondly, it is said that the loss was occasioned by the perils of the sea. It was, however, expressly decided in a case arising out of this same accident, *Lloyd* v. *General Iron Screw Collier Company* (2), that where the collision is occasioned by the negligence of the defendants' servants, it is not a peril of the sea.

[WILLES, J. That had been previously decided by this Court in *Phillips* v. *Clark* (3), and by the Court of Exchequer itself in a still earlier case. (4)]

(1) "In case any damage to person or property arises from the nonobservance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

(2) 3 H. & C. 284; 33 L. J. (Ex.) 269.

(3) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

(4) Probably *Wyld* v. *Pickford*, 8 M. & W. 443.

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Those cases were not referred to in the argument, because counsel were stopped by the Court.[1] The cases of *Worms* v. *Storey* (1) and *Siordet* v. *Hall* (2) shew that in an action on a bill of lading the shipowner is liable for the negligence of his servants. In the case of insurance you look at the proximate cause, which may be the sea, but in other cases you look at the real cause, which is the negligence. All the learning on this subject is collected in *Dakin* v. *Oxley*. (3) The same point has been decided in the American courts: *Jones* v. *Pitcher* (4); Parsons on Maritime Law, p. 191. Thirdly, no distinction exists between negligence and gross negligence: *Wilson* v. *Brett*. (5) In any view, carriers are liable for any negligence: *Wyld* v. *Pickford* (6); *Lyon* v. *Mells*. (7) Fourthly, there is no distinction between the loss of the ship and the loss of the cargo, and it was for the defendants to prove that the *Araxes* could have prevented the loss of the goods by different conduct, for the covenant to deliver is absolute unless they can bring the case within one of the exceptions. There was no evidence of this at all. Fifthly, the answers taken under the commission were rightly received. The vivâ voce examination was within the powers given by the order to examine witnesses. At any rate the defendants have waived any objection, their agent having been present and cross-examined the witnesses.

Edward James, Q.C., Karslake, Q.C., and *Sir G. Honyman*, in support of the rule. This is not an action by one shipowner against another, but an action against a carrier for nondelivery, and turns entirely, therefore, on the terms of the contract. A carrier may limit his liability under a contract in any way he pleases: *Austin* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (8), *Great Northern Railway Company* v. *Morville* (9), *Carr* v. *Lancashire and Yorkshire Railway Company* (10); and the whole question, therefore, is, whether the terms of the contract are such as to

(1) 11 Ex. 427; 25 L. J. (Ex.) 1.
(2) 4 Bing. 607.
(3) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 115.
(4) 3 Stewart and Porter, 135.
(5) 11 M. & W. 113; 12 L. J. (Ex.) 264.
(6) 8 M. & W. 443, 461; 10 L. J. (Ex.) 382.
(7) 5 East. 428.
(8) 10 C. B. 454; 21 L. J. (C.P.) 179.
(9) 21 L. J. (Q.B.) 319.
(10) 7 Ex. 707; 21 L. J. (Ex.) 261.

prevent the defendants being liable in this instance. First, as to the exception of loss arising from barratry. It is not necessary that the act should be criminal for it to be barratrous, though under the earlier Merchant Shipping acts the person in charge of the vessel appears to have been made criminally responsible for a breach, without reasonable cause, of the regulations; barratry is not mentioned as a crime in Russell on Crimes, except in quite a different sense. It is not necessary, either, that there should be an intention to injure the owner. Any wilful act that does injure the owner is barratrous, for a man must be held to have intended the natural consequence of his wilful acts. If the master has precise instructions, a wilful departure from them is barratrous; and every master has implied instructions to obey the laws of his country, and to disobey them, therefore, is a breach of trust. Arnould in his work on Insurance, 3rd ed. p. 712, says, "Barratry, then, in English law, may be said to comprehend . . . every wilful act on his (the master's) part of known illegality . . . by whatever motive induced, whereby the owners of the ship are in fact damnified." Here it cannot be said that the person in charge of the *Black Prince* did not know that his act was illegal. In a note to the above passage in Arnould on Insurance it is said: "The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in *Lewen* v. *Suasso*, viz. that it is 'an act of wrong done by the master against the ship and goods'"; and that definition was adopted by Lord Ellenborough in *Earle* v. *Rowcroft*. (1) In that case Lord Ellenborough says: "A fraudulent breach of duty by the master in respect to his owners, or in other words, a breach of duty in respect to his owners with a criminal intent, or ex malificio, is barratry." And in *Heyman* v. *Parish* (2) the same judge says: "Fraud is not necessary. It has been solemnly decided that a gross malversation by the captain in his office is barratrous." In Kent's commentaries, vol. iii. pp. 305, 306, barratry appears to be defined as a wilful breach of duty by the master, in his character of master, to the injury of his owner. See also *Wilson* v. *Rankin*. (3) It may be that if the act does not violate the law it is not barratrous, unless there is

(1) 8 East 126, 138.

(2) 2 Camp. 149.

(3) 6 B. & S. 208; 34 L. J. (Q.B.) 62; in error, Law Rep. 1 Q. B. 162.

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fraud, which will explain the case of *Phyn* v. *Royal Exchange Assurance Company* (1), and other similar cases. Here, however, there was a distinct violation of the law, and therefore of the implied instructions of the owners to act according to law, and consequently a breach of trust. If the person in charge of the deck of the *Black Prince* starboarded the helm with the intention of breaking the law, there can be no doubt that it was barratry, and the object of the 299th section of the Merchant Shipping Act, 1854, was to render it unnecessary to inquire whether there was in fact such an intention or not. That section cannot refer only to the liability of the owner of one ship to the owner of the other in case of a collision, because that is provided for by the 298th section. It is said that the defence has never been raised before, that such an act is barratrous; but the other actions have been between shipowners where it could not have been raised, as they were not for a breach of contract but for a breach of duty; and the master is liable for the acts of his servant, even though they may have been wilful: see the cases collected in Smith's Law of Master and Servant, p. 154. In the case of *Tuff* v. *Warman* (2) the action was against a pilot, who was employed compulsorily, and the objection could not be taken.

Secondly, the loss was caused by a peril of the sea within the meaning of the contract. In the case of *Lloyd* v. *General Iron Screw Collier Company* (3), the demurrer admitted the truth of the replication, that the loss was caused *entirely* by the gross negligence of the crew of the *Black Prince*, and it did not appear that the sea had anything to do with it. In fact, however, the loss was caused by the sea, though it may have been partly occasioned by negligence. The intention of the contract was to prevent the defendants from being liable for loss from any risks which the owner of the goods could insure against, and the words ought to be interpreted in the same way as in the case of a policy of insurance. That this loss would be held to be a loss by a peril of the sea in an action against an underwriter is shewn by *Dixon* v. *Sadler* (4), *Smith* v. *Scott* (5), Maskell on

(1) 7 T. R. 505.

(2) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; in error 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

(3) 3 H. & C. 284; 33 L. J. (Ex.) 269.

(4) 5 M. & W. 405.

(5) 4 Taunt. 126.

Insurance, pp. 390, 391. The words here are very general: "accidents or damage of the seas of whatever nature or kind soever excepted." In *Phillips* v. *Clark* (1) there were no general words. In *Wilton* v. *Atlantic Royal Mail Steam Navigation Company* (2) the judges expressly refrained from any decision on the point, which shews that it is at least doubtful.

[WILLES, J. There it was the expression "no liability of *any kind*" which caused the doubt.]

Thirdly, the replication avers gross negligence, and if this point were not taken it would be said, if we appeal, that gross negligence must be assumed to have been proved. That there is a distinction between gross and ordinary negligence is shewn by *Coggs* v. *Bernard* (3), *Hinton* v. *Dibbin* (4), *Beal* v. *South Devon Railway Company*. (5) The question really is, what degree of negligence is sufficient to prevent the cause of the loss being a peril of the sea? Mere statutable negligence is not. Fourthly, the declaration avers that the loss of the goods, not the collision, was occasioned by the negligence of the defendants; and it is quite possible that though the collision could not have been avoided by the *Araxes*, yet that if she had acted differently the injury might have been less, and the *Black Prince* not have sunk, and if so, the verdict ought to have been for the defendants. This point, however, was not left at all to the jury.

Lastly, the depositions at Messina were wrongly received; the intention of the commission was that the examination should be by written interrogatories, although power was given to examine vivâ voce also, in case it should be desirable to ask any question in explanation of the answers to the written interrogatories: in fact, however, the examination was wholly vivâ voce. If the defendants had been aware that such would be the case, they would have sent out a proper person to conduct the examination. It is said that the defendants' agent, Mr. Tagliavia, waived this objection by cross-examining the witnesses, but he was not the defendants' agent for the purpose of dispensing with the terms of the commission and could not bind them. A new trial has often

(1) 2 C. B (N.S.) 156; 26 L. J. (C.P.) 168.

(2) 10 C. B. (N.S.) 453; 30 L. J. (C.P.) 369.

(3) 1 Sm. L. C. 5th ed. 179.

(4) 2 Q. B. 646; 11 L. J. (Q.B.) 113.

(5) 5 H. & N. 875; 29 L. J. (Ex.) 441; in error, 3 H. & C. 337.

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been granted on the ground that depositions were admitted which were not taken in accordance with the terms of the commission.

WILLES, J. I am of opinion that this rule should be discharged. With respect to the admission of the depositions taken at Messina, I should much regret if it were true that an objection going only to the regularity of the proceedings, and not to the merits, could be taken advantage of to obtain a new trial. It is not necessary, however, to decide whether the objection could be taken at the trial, or whether it should have been taken before, and an application made at chambers to set aside the depositions, because I am not convinced that there was any irregularity. The things complained of are that one of the witnesses named in the commission was not examined, and that the interrogatories and cross-interrogatories were not exhibited, but the witnesses were examined vivâ voce. No question, however, has been suggested which might have been asked with advantage to the defendants, and has been omitted, and it appears, therefore, that the objection has no solid foundation, but only amounts to this, that the questions were put vivâ voce instead of in writing.

The point which was reserved at the trial was, whether the loss, though it was one for which, but for the exceptions in the bill of lading, the defendants would have been liable, yet fell within the exceptions as being caused by barratry. The Court must see, therefore, whether there was in fact any evidence of a barratrous act. What took place was this: the *Araxes* was steering rightly, for there was no evidence of any negligence on the part of the *Araxes*, but the *Black Prince* at some time improperly starboarded her helm, which caused the collision. It did not appear what was the extent of the default on the part of the *Black Prince*; it may have been anything from simple negligence to actual malfeasance. It could not, therefore, be contended, on the part of the defendants, that there was any proof of barratry, but for the statute. The case of *Earle* v. *Rowcroft* (1) and other similar cases, in which it has been held that to use a vessel for smuggling or other illegal purpose is barratrous, were decided on the ground that no one has a right wilfully to risk the property of another without his permission, by

(1) 8 East, 126.

doing an illegal act, even though the intention may be to confer a benefit. Here there was no evidence apart from the statute that the act that caused the loss was of any such character; but it is contended that the statute makes it barratrous because it says that it shall be deemed to have been the wilful default of the person in charge of the deck, and it is said that it must therefore be considered for all purposes that the helm was wilfully starboarded. I do not think that that follows. The act was not passed to decide cases such as that now before us, but to regulate ships and the rights of shipowners inter se. It was contended in one case, *The Seine* (1), that the statute rendered the act one of malfeasance, and beyond the scope of the employment of the person in charge, for which his employer would not be liable. It was there held, however, that the statute had no such effect, and that the words, though not happily chosen, were intended only to mean that the ship by which the regulations were broken should be considered as the one in fault, and the owners answerable for the consequences as if they had done it wilfully, unless they could justify the departure from the regulations. This view is confirmed by the subsequent act 25 & 26 Vict. c. 63, at which the Court may look to see what the legislature means by the language used. Sec. 28 contains the same provision as the former act, that the damage arising from a breach of the regulations shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, and s. 29 provides that in case of a collision through the nonobservance of the regulations by one of the ships, such ship shall be deemed to have been in fault, and that no doubt is really the meaning of the preceding section likewise.

Secondly, a new trial is asked for on the ground that the loss was caused by a peril of the sea. This has been already decided in the Court of Exchequer in an action arising out of the same accident, and turning on the construction of the same document, and the decision is supported by that of this Court in *Phillips* v. *Clark*. (2) As, however, reference has been made to cases on policies of insurance and the interpretation that has been given to them, I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only neces-

(1) Sw. Adm. Rep. 411. (2) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 163.

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sary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant.

It is further complained that the Lord Chief Justice misdirected the jury because he made no distinction in this case between gross and ordinary negligence. No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the dictum of Lord Cranworth in *Wilson* v. *Brett* (1), that gross negligence is ordinary negligence with a vituperative epithet,—a view held by the Exchequer Chamber: *Beal* v. *South Devon Railway Company*. (2) Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up.

The only remaining point arises from the fact that this is an action by the owners of goods on board the *Black Prince*, and not by the owners of the ship itself; and it is said, therefore, that it ought to have been left to the jury to say whether the loss of the goods was caused by the negligence of the crew of the *Black Prince* and not whether the collision was caused by it. It is contended

(1) 11 M. & W. 113. (2) 3 H. & C. 337.

that though the collision perhaps could not have been avoided by any act of the *Araxes*, yet it might have been so modified that the goods should not have been lost. This either means that the *Araxes* acted wrongly in some way, and so increased the effect of the collision, of which however there was no evidence, or else that the defendants' acts are to be qualified by the fact that if the *Araxes* had in fact acted differently, the goods might not have been lost. It is clear, however, that a person acting wrongfully is answerable for all the natural consequences of his act: *Davis* v. *Garrett* (1); and it is also clear that the loss of these goods was a natural consequence of the negligence of the defendants.

KEATING, J., concurred.

MONTAGUE SMITH, J. I also think that this rule should be discharged. The collision which was followed by the foundering of the *Black Prince* and the loss of the cargo, was caused by the negligence of the person in charge of the *Black Prince* in starboarding her helm. It is said that this was in contravention of a positive rule laid down by statute and therefore barratrous. It is quite consistent, however, with the evidence that those on board the *Black Prince* were asleep or below deck, and suddenly awaking, or coming on deck, and perceiving the emergency too late, starboarded the helm, in the hope of avoiding the collision, or by mistake. It would be a strong thing to say that if the person in charge goes to sleep, and an accident happens in consequence, his conduct is barratrous. It is hardly contended, however, that there would have been any evidence of barratry but for the enactment of the Merchant Shipping Act, which says that certain nonobservances shall be deemed to be wilful defaults. I entirely agree with my Brother Willes that the words of the statute have no such force, in a case like the present, as that contended for. The whole scope of the act shews that there was no intention on the part of the legislature to alter the effect of contracts made between shipowners and shippers, and to relieve the former of any of their liability. Then it was said that the Lord Chief Justice should have told the jury that the loss arose from a peril of the sea. This is the same question that was decided by the Court of Exchequer in *Lloyd* v. *General Iron Screw Collier Company*. (2) It is said that here it

(1) 6 Bing. 716. (2) 3 H. & C. 284; 33 L. J. (Ex.) 269.

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arises on the facts which were not before the Court in that case, but the Court seem to have assumed very much the state of facts that actually occurred, and I think that the Lord Chief Justice was bound by that decision, and that we are bound by it too. Next it is objected that he ought to have left the question whether there was *gross* negligence. I do not see what more he could have said, except it was to use the very word "gross"; but it certainly would not have enlightened the jury to use an indefinite word without explaining it, and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence. In this case it was unnecessary to define the degrees of care, and the replication would have been equally good without the word gross. The other alleged misdirection is that my Lord ought to have left the question to the jury whether the foundering of the *Black Prince*, and not merely the collision, was caused by the conduct of the *Araxes*. I think this objection might prevail if there were any facts to support it, but there is not the slightest evidence that the *Araxes* by other conduct could have lessened the extent of the injury. It is a mere speculation of counsel. With respect to the point raised regarding the depositions, the Lord Chief Justice could not have refused to receive them unless they were taken without authority, which it seems to me was not the case. If there was any irregularity in the mode of taking them, the proper course would have been to have applied at chambers to have them suppressed.

ERLE, C.J. I have nothing to add.

Rule discharged.

Attorneys for plaintiff: *Pritchard & Sons.*
Attorneys for defendants: *Thomas & Hollams.*

APPLEBY AND ANOTHER *v.* MEYERS. 1866
June 12.

Contract, construction of—Complete Performance rendered impossible by an Accident beyond Plaintiffs' control—Implied Promise.

The plaintiffs contracted with the defendant to erect upon premises in his possession a steam-engine and machinery, the works being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them were so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable portion of the necessary materials for that purpose was upon the building, when the whole premises, with the machinery and materials, were destroyed by an accidental fire:—

Held, that the plaintiffs were not entitled to recover the whole of the contract price; but that, inasmuch as the machinery was to be fixed to the defendant's premises, so that the parts of it when and as fixed would become his property and be subject to his dominion, and the contract must be taken to involve an implied promise on the defendant's part to keep up the building, they were entitled to be paid, as upon an implied contract, the value of the work and materials actually done and provided by them under the agreement.

THIS was an action brought to recover 419*l.* for work done and materials provided by the plaintiffs, engineers, for the defendant, under the circumstances hereinafter mentioned. The following case was stated, by consent, without pleadings, for the opinion of the Court:

On the 30th of March, 1865, the plaintiffs entered into an agreement with the defendant, which was headed, "Specification and estimate of engine, boiler, lifts, &c., for B. Meyers, Esq., Southwark Street. Messrs. Tillott & Chamberlain, architects. 30th March, 1865." This contract contained ten distinct parts or divisions, viz. 1, boiler; 2, engine; 3, shafting; 4, lifts; 5, shafting; 6, drying-room; 7, copper pans; 8, tanks; 9, pump; 10, steam-boxes,—under each of which headings were particular descriptions of the work to be done in connection with each respectively, and the prices to be charged for the same; and the document concluded with these words:

"We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work, for the sums above named respectively, and to keep

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the whole in order, under fair wear and tear, for two years from the date of completion. All brickwork, carpenters' and masons' work, and materials, are to be provided for us; but the drawings and general instructions required for them to work to will be provided by us, subject to the architects' approval.

(Signed) Appleby, Brothers."

The total cost of the above works, if they had been completed under the contract, would have amounted to 459*l*.

On the 4th of July, 1865, a fire accidentally broke out on the premises of the defendant in Southwark Street, which entirely destroyed the said premises and the works which then had been erected thereon by the plaintiffs in part performance of the contract above set out.

At the time of the fire the works contracted to be erected as aforesaid had not been completed.

The premises upon which the several works were to be erected were the property of the defendant, in his occupation, and under his entire control. The plaintiffs had access thereto only for the purpose of performing their contract.

At the time of the fire, portions of the items Nos. 1 to 8 were erected and fixed, and some of the materials for the others were on the premises.

The defendant had not completed the carpenters' and masons' work to be prepared by him under the agreement.

The tank had been erected by the plaintiffs, and was used by the defendant by taking water therefrom for the purposes of his business; but the other apparatus connected with it, as specified in No. 8, was not completed. The plaintiffs' workmen were still engaged in continuing the erection and completion of the same at the time of the fire.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiffs were entitled to recover the whole or any portion of the contract price.

Holl, for the plaintiffs. The plaintiffs are at all events entitled to recover the value of the work which had been executed by them at the time of the fire. From its nature, the machinery would necessarily be fixed to the premises of the defendant, and would when

fixed become his property. Part of the work was actually being made available by the defendant in his business. Suppose the plaintiffs had received a part of the agreed price, could it be for a moment contended that he could on the fire happening have recovered it back as upon a failure of consideration? In *Menetone* v. *Athawes* (1), a ship-wright was held to be entitled to recover the value of repairs done to a ship, though the ship was burnt in the dock before the repairs were completed, Lord Mansfield considering it a "desperate case" for the defendant. This case is even stronger; the work having been done upon the defendant's own premises, and the materials being salvage for him. The rule of the Roman law upon this subject is thus stated in Story on Bailments (2): "If, while the work is doing on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, Pothier holds that the latter is entitled to compensation to the extent of the value of the labour actually performed on it, unless his contract import a different obligation; for, the maxim is, 'Res perit domino.' (3) Pothier further insists, that, if the workman has employed his own materials as accessorial to those of his employer, he is in like manner entitled to be paid for them, if the thing perishes before it is completed. The same doctrine seems to have been promulgated in the Roman law, and was applied to the case of a house accidentally thrown down by an earthquake, while in building; and the loss was held to fall wholly on the owner: Marcus domum faciendam a Flacco conduxerat; deinde operis parte effectâ, terræ motu concussum erat ædificium. Massurius Sabinus, si vi naturali, veluti terræ motu, hoc acciderit, Flacci est periculum." (4) And in s. 426 *a* the learned author expresses an opinion that these principles are also well founded in the common law. It will probably be urged, that, inasmuch as the contract was entire, the plaintiffs are entitled to recover nothing unless the whole was completed. But the inability of the employer, from whatever cause, to enable the plaintiffs to finish the work clearly will not disentitle them to recover for what they have done.

(1) 3 Burr. 1592. (2) 5th ed. s. 426. (3) Contrât de Louage, n. 433.
(4) Dig. Lib. 19, tit. 2, l. 59; Pothier, Pand. Lib. 19, tit. 2, n. 68.

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Hannen, contrà. The simple question here is, whether or not the condition upon which the plaintiffs were entitled by the terms of the contract to demand payment, viz. the completion of the work, has been fulfilled. *Menetone* v. *Athawes* (1), is clearly distinguishable, for there there was no stipulation for the time at which the work was to be paid for. There are numerous cases to shew that, where the contract is entire, the workman is not entitled to recover anything unless he has performed it or has been discharged by his employer from his obligation to perform it. Of this class is the case of *Sinclair* v. *Bowles* (2), the chandelier case. The general rule is well laid down in Chitty on Contracts (3), where, referring to *Menetone* v. *Athawes* (1) and *Gillett* v. *Mawman* (4), it is said: "The destruction of the work by an accidental fire, or other misfortune, before it is finished or delivered, does not deprive the workman of his right to remuneration to the extent of the work done; unless, *by the uniform custom of the particular trade*, payment is not to be made until the work is completed and delivered." In the place of custom, we have here express contract. In *Adlard* v. *Booth* (5), where a printer had been employed to print a work, of which the impression was to be a certain number of copies, and a fire consumed the premises before the whole number had been worked off, it was ruled by Tindal, C.J., that the printer could not recover any part of the price, although some of the sheets had been actually delivered, because the benefit from the partial delivery was not proportionable. So, here, the work done was useless to the defendant in its incomplete state.

[BYLES, J. If the plaintiffs had been prevented by the act of the defendant from completing the work, the defendant would have been bound to pay. Does it make any difference that the inability to complete was caused by the defendant's misfortune?]

It was a common misfortune. There was nothing to prevent the plaintiffs from insuring the materials whilst the contract was proceeding.

[MONTAGUE SMITH, J. This case must be decided without reference to any right to insure.]

(1) 3 Burr. 1592. (2) 9 B. & C. 92; 4 M. & R. 1.
(3) 7th ed. by Russell, pp. 513, 514 (4) 1 Taunt. 137.
(5) 7 C. & P. 108.

In *Taylor* v. *Caldwell* (1) it is laid down that, where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible.

[MONTAGUE SMITH, J. Were not the defendants excused by the fire from the full performance of their contract?]

No doubt they were. But, to entitle them to demand payment for any part of the work done, they must shew that they have complied with the condition, viz. the complete performance.

[ERLE, C.J. Suppose the completion of the work had been prevented by the entry of the landlord to distrain? Or, suppose the defendant held under one having only an estate for life, and the life had dropped?]

In the former case, performance would have been rendered impossible by the defendant's own default: and, in the latter, the state of his title would be held to be a matter which the defendant was bound to contemplate. Here, however, the nonperformance of the contract is due to an accident which the defendant could not have foreseen or prevented. It was the act of God. In Story on Bailments (2), referring to the passage already cited, the learned author says: "The foregoing doctrine proceeds upon grounds applicable to the general contract of hire. But, suppose there is a contract to do work on a thing by the job (as, for example, repairs on a ship) for a stipulated price for the whole work, and the thing should accidentally perish or be destroyed, without any default on either side, before the job is completed, the question would then arise whether the workman would be entitled to compensation pro tanto for his work and labour done and materials supplied up to the time of the loss or destruction. It would seem, that, by the common law, in such a case (independent of any usage of trade), the workman would not be entitled to any compensation, and that the rule would apply, that the thing should perish to the employer, and the work to the mechanic; for the contract by the job would be treated as an entirety, and should be completed before the stipulated compensation would be due."

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164. (2) S. 426 *b*.

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Holl, in reply. The judgment in *Taylor* v. *Caldwell* (1) expressly sustains the plaintiffs' claim. Blackburn, J., goes on to say: "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied: and there are authorities which, as we think, establish the principle, that, where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible, from the perishing of the thing, without default of the contractor." Here it was impossible that the plaintiffs should, without the continued existence of the premises, perform the works contracted for. Such continued existence, therefore, must be implied as a condition. Besides, the brick foundations, without which the plaintiffs could not erect the machinery, were to be prepared by the defendant. His inability to provide these rendered the plaintiffs' complete performance of their work impossible. In *Adlard* v. *Booth* (2) the fire occurred upon *the plaintiff's* premises: and there was nothing to prevent him from reprinting the work, and so completing his contract. Here the plaintiffs could not do so. The only case exactly in point is that of *Menetone* v. *Athawes*. (3)

[KEATING, J. In *Roberts* v. *Havelock* (4), Lord Tenterden expressly saved the doctrine in *Sinclair* v. *Bowles*. (5)]

There is no stipulation here as to the time of payment: therefore, according to the case of *Roberts* v. *Havelock* (4), the plaintiffs might have insisted upon being paid as each portion of the work was done.

[ERLE, C.J. Suppose the contract had stipulated that the work

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(2) 7 C. & P. 108.
(3) 3 Burr. 1592.
(4) 3 B. & Ad. 404.
(5) 9 B. & C. 92; 4 M. & R. 1.

should be paid for by instalments, and that the plaintiffs should keep the machinery in repair for twelve months, the last instalment to be withheld until the expiration of that time, and the premises were burnt in the interim, would the plaintiffs lose the last instalment ?]

Clearly not. It was an implied condition that the defendant should enable the plaintiffs to complete their contract, by insuring the continued existence of the premises upon which the works were to be erected.

Cur. adv. vult.

The judgment of the Court (Erle, C.J., Byles, Keating, and Montague Smith, JJ.) was delivered by

MONTAGUE SMITH, J. In this case the plaintiffs, who are engineers, had contracted by an agreement in writing with the defendant to do certain works upon buildings on his premises, viz. to provide and erect upon them a steam-engine and machinery connected with it. The works were divided into different parts, and separate prices were fixed upon each of those parts. The plaintiffs agreed to provide and erect the machinery for those prices. The case finds that the premises were in the occupation and under the control of the defendant; that all parts of the work were far advanced towards completion; that some parts were so nearly finished that the defendant had used them for the purposes of his business; but that none of the parts into which the work had been divided were absolutely complete. The works were in this state when an accidental fire broke out on the defendant's premises and destroyed the defendant's buildings and the work done upon them by the plaintiffs.

The question submitted to us is, whether, under these circumstances, the plaintiffs are entitled to recover the whole or any portion of the contract price.

It is clear that the plaintiffs cannot recover the whole contract price, as a specific sum for that was only to be paid on the completion of the works, an event which has not happened. But we think that, under the circumstances, they are entitled, upon an implied contract, to be paid the value of the work done; which value we assume, from the form of the question, the parties are content to estimate upon a due proportion of the contract price.

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It was contended for the defendant that the fire was a common misfortune excusing both parties from the performance of the contract: and we were pressed to adopt the principle laid down by the Court of Queen's Bench in the case of *Taylor* v. *Caldwell.* (1) In one part of the judgment in that case it is said, no doubt in general terms,—"The principle seems to us to be, that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

The Court of Queen's Bench may have properly adopted and applied this principle in the case of the contract before them: but we think it cannot be correctly applied to the present case, where the contract is of a different kind, and appears to fall within that qualification of the principle found in the early part of the same judgment, where the Court say, that, "*in the absence of any express or implied warranty that the thing shall exist,*" the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused by the perishing of the thing before breach.

By the agreement between these parties, the machinery was to be fixed to the buildings of the defendant, so that the parts of it when and as fixed would become his property and subject to his dominion. And we think we fulfil the intention of those who entered into this contract, by holding that it is an implied term of it that the defendant should provide the buildings, the subject on which the work was to be done, and keep them in a fit state to enable the plaintiffs to perform their part of the contract.

If the defendant had refused to allow the plaintiffs to have the use of the buildings, or by his own act or default had rendered them unfit to receive the work, there can, we apprehend, be no doubt that the plaintiffs might either have sued for a breach of the contract, or have treated the contract as rescinded and recovered the value of the work done, on a quantum valebat count. These rights of action would accrue to the plaintiffs, not by reason of any express words of agreement, but in virtue of the implied term of the contract to which we have referred.

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

Then, is the nonperformance of this implied term on the part of the defendant excused by the happening of an accidental fire? We think it is not excused by that event.

The general rule of law is clear, that, when a man contracts to do a thing, he is bound to do it or make compensation, notwithstanding he is prevented by inevitable accident. We hold that an implied promise is present in this contract on the part of the defendant to provide and keep up the buildings, and, as a consequence, he must be liable in this case, unless we ought to annex a condition or exception to his promise exonerating him from the performance of it in the case of fire or other accident.

When the plaintiffs agreed to expend their materials and labour on buildings of the defendant, of which he was to retain the possession and control, it is reasonable to infer that it was contemplated that the subject on which the work was to be done should be provided and kept at his risk and peril; and it is unreasonable to suppose that the parties intended that, if a fire happened, in no way attributable to the plaintiffs, the defendant should be set free from all obligation under the contract.

We think that, if we were to imply an exception or condition having this effect, we should not fulfil, but frustrate, the real intention of the parties. It appears to us that such a fire no more excuses the defendant than an eviction of both plaintiffs and defendant from the buildings by title paramount would have done.

No decision directly in point was cited to us, but the learned counsel on both sides referred to Story on Bailments (1), and each relied on certain passages as being in his favour. The application of the maxim, "Res perit domino," to cases of a kind in some respects like the present is discussed by the learned author. But the authorities he has collected appear to leave open the precise question we have to decide in this case.

The judgment of the Court is for the plaintiffs to the extent before indicated.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Harrison & Lewis.*
Attorney for defendant: *J. S. Salaman.*

(1) 426th and following sections.

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April 27.

JORDAN AND ANOTHER *v.* MOORE.

Letters-Patent—Construction of Specification—Application of known Materials to an analogous Purpose.

A. obtained a patent for "certain improvements in the construction of ships and other vessels navigating on water." By his specification, he claimed as his invention (amongst others), 1. the construction of ships "with *an* iron frame, combined with an external covering of timber planking for the sides, bilges, and bottoms;" 6. "the construction of iron frames adapted to an external covering of timber for the sides, bilges, and bottoms, *as described*:"—

Held, that the expression "iron frame" in the first claim was not confined to an iron frame such as that specified in the sixth claim, but comprehended whatever might, according to the ordinary use of language, be called "an iron frame;" and that, inasmuch as the combination of iron and timber in the construction of ships was already well known and commonly used, the patent could not be sustained.

THIS was an action for the infringement of a patent granted to one John Jordan for "Certain Improvements in the Construction of Ships and other Vessels navigating on Water."

The declaration stated that John Jordan was the true and first inventor of a certain new manufacture, viz. certain improvements in the construction of ships and other vessels navigating on water, for which letters-patent were granted to him for fourteen years from the 2nd of November, 1849, subject to the usual condition; that he within the prescribed time fulfilled the condition; that the letters-patent were afterwards assigned to the plaintiffs; that they obtained an extension thereof, with a further grant of letters-patent, for seven years from the 3rd of November, 1863; and that the defendant after the last-mentioned date infringed the same. The plaintiffs claimed an injunction and account.

The defendant pleaded,—first, not guilty,—secondly, that John Jordan was not the true and first inventor,—thirdly, that the invention was not any manner of new manufacture, as alleged,—fourthly, that the invention was not any manner of manufacture for which letters-patent could by law be granted,—fifthly, non concessit,—sixthly, that John Jordan did not within the time prescribed fulfil the said condition, as alleged,—seventhly, a traverse of the assignment of the original letters-patent to the plaintiffs,—

eighthly, a traverse of the grant of the further letters-patent, as alleged, to the plaintiffs.

The plaintiffs joined issue upon all these pleas.

The material parts of the particulars of objections delivered by the defendant were as follows:—That the alleged inventor was not the first and true inventor; that the alleged invention was not an invention of any manner of new manufacture; that the specification did not particularly describe and ascertain the nature of the alleged invention, and in what manner the same was to be and might be performed; that the alleged inventor did not sufficiently distinguish and point out in his specification which things he claimed to have invented, and which he did not claim to have invented, or admitted to be old; that the alleged invention was not the proper subject of letters-patent; that the alleged patent was a patent for a principle only, and not for any manner of new manufacture; that the alleged inventor by his specification claimed a principle of applying old contrivances to new objects; that the specification was unintelligible; that the alleged invention was of no use or advantage to the public; that the principle claimed by the specification was generally known to ship-builders before the date of the letters-patent; that the alleged invention was published before that date, and that, in proof thereof, the defendant would rely on certain inrolled specifications of inventions for which letters-patent had been granted to other inventors between the years 1814 and 1845 (giving the names of the grantees and the particulars of their several inventions); and that John Jordan by his specification claimed some of the matters thereby patented.

The cause was tried before Byles, J., at the sittings at Westminster after last Michaelmas Term.

The specification, dated the 24th of April, 1850, was put in. The patentee therein described "the nature of his invention and the manner in which the same was to be performed," as follows:—

"My invention consists of improvements in the construction of ships and other vessels navigating on water.

"First, for the combination of an iron frame with an external covering of timber planking for the sides, bilges, and bottoms.

"Secondly, for the peculiar manner of making the butt-joints of the external covering of timber planking.

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"Thirdly, for the construction of an iron frame with a timber keel.

"Fourthly, for the combination of an iron frame with a timber stern.

"Fifthly, for the combination of an iron frame with a timber stern-post.

"Sixthly, for the peculiar manner of constructing an iron frame adapted to a covering of wood for the sides, bilges, and bottoms, and combining with the frame a timber stern, a timber keel, and a timber stern-post.

"Seventhly, for the peculiar manner of constructing the keel-plate, the stem-plate, and the stern-plate.

"Eighthly, for the peculiar manner of constructing the keelson or keelsons.

"Ninthly, for the peculiar manner of constructing the vertical and horizontal stringers.

"Tenthly, for the application of rolled iron of a bridge form, similar to a bridge rail, as ribs, in the construction of the iron frame of vessels navigating on water, built of iron, or iron and timber combined.

"Eleventhly, for coating the bottoms of vessels navigating on water with a mixture of gutta-percha and black lead, and also such parts as are made of iron.

"In order that my invention may be fully understood and readily carried into effect, I will proceed to describe the means to be pursued in carrying out any of my improvements, reference being made, when required, to the accompanying drawings.

"For carrying out my first improvement, a suitable iron frame is to be constructed, to which an external covering of timber planking for the sides, bilges, and bottom will be fastened by means of rivets, bolts, or any known or suitable fastening. I make no claim to the shape of the iron used in the frame, as it may be constructed of angle-iron, T iron, flat or bar-iron, or iron of any suitable shape. The vessel may have one or more thicknesses of timber planking, and may be sheathed with copper and felt, or zinc and felt, or galvanized metal and felt, for the purpose of keeping the bottom of the vessel from fouling; for which sheathing I make no claim.

"For carrying out my second improvement, I make the butt-ends of the timber planking with an iron plate placed inside to cover the vertical joints, the iron plate being of sufficient length and thickness to be fastened to the ends of the abutting planks; and between the timber planking and the iron plate I place a thickness or layer of felt, gutta-percha, or india-rubber. In this manner I add strength to the planking, and at the same time make a water-tight joint. (The horizontal joints or seams between the planks will be caulked in the usual manner in which the planks of timber-built vessels are usually caulked, viz. with oakum, for which I make no claim.)

"For the carrying out my third improvement, I make an iron plate of any suitable form run the whole length of the bottom of the vessel, to which I fasten a keel made of timber, with bolts or rivets, or any other suitable fastening.

"And for carrying out my fourth and fifth improvements, I cause the iron plate forming the keel-plate to be continued up the bow of the vessel, and also up the stern of the vessel, to which I fasten a stem made of timber at the bow, and at the stern I fasten a stern-post made of timber, by means of bolts, rivets, or any suitable fastening.

"For the carrying out my sixth improvement, to construct an iron frame adapted to an external covering of timber planking for the sides, bilges, and bottoms, and for a timber keel, timber stem, and timber stern-post, I make an iron plate form the keel-plate, laid the whole length of the bottom of the vessel, and continued up the stem and stern. To this plate I fasten the keel, stem, and stern-post, made of timber, as just described. The plate is to be bent so as to form an apron or holding for the ends of the external planking of the sides, bilges, and bottom. Across the keel-plate iron ribs are to be fastened, and floorings of iron are to be fastened to the iron ribs. On the top of the floorings I place the keelson made with plate and angle-iron, or rolled iron, and fastened to each floor at each extremity of the vessel; the keelson is made to assume a curvilineal form, or portion of an inverted arch, to keep the ends of the vessel from drooping. The deck-beams, both upper and lower, will be placed and fastened in the manner usually adopted in iron-built vessels, that is to say, fastened to the sides,

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and if necessary, where convenient, to the ribs. In the wake of the upper and lower deck-beams I place on the outside of the ribs stringers of plate iron, or plate iron binding strakes all round the vessel, and fasten the same to each rib, and also to the stem-plate or apron forward, and to the stern-plate aft the vessel; the ends of the deck-beams are fastened to these stringers. There will also be stringers on top of the ends of the beams, lying horizontally, fastened to each rib, to each beam, and, if necessary, to the stringers outside of the ribs. For the horizontal stringers on the top of the ends of the deck-beams I make no claim. There may be also other stringers introduced inside the ribs, if necessary, for which I make no claim.

"The keelson or keelsons may also be constructed in the following manner, in carrying out my seventh and eight improvements:—On the top of the keel-plate before described the keelson will be placed, and the ribs will abut and be fastened to the keelson and also to the keel-plate; the floorings will abut and be fastened to the keelson, and in the usual manner to the ribs. The other method of constructing the keelson on the top of the floorings has been described before.

"For carrying out my ninth improvement, I place vertical stringers outside the ribs, fastened to each rib and to the ends of the beams, and also, if necessary, to the horizontal stringers, as before described in the description of the frame.

"My tenth improvement is for the application of rolled iron of the bridge form, similar to a bridge rail, in the construction of the iron frame of vessels navigating on water, built of iron, or iron and timber combined. The iron plates or timber planking may be fastened by any known means to the flanges of the bridge rib, or the bridge rib may be reversed, and the iron plates or timber planking fastened by any known means to the top of the bridge rib, and the ceiling or linings fastened to the two flanges of the bridge rib. By this mode of construction the whole of the iron work will form a complete frame, to which the wood work will be attached.

"My eleventh improvement is for the application of a mixture of gutta-percha and black lead for coating the bottoms of vessels either of wood or iron, to prevent fouling, and also for coating such other parts as are made of iron, to prevent corrosion. The gutta-

percha is to be dissolved in spirits of turpentine, naphtha, or any other solvent, for which I make no claim, and the black lead is to be mixed with the solution to any consistency required, and applied hot.

"Having now described the nature of my invention, and the manner in which the same may be performed and carried into effect, I would have it understood that I make no claim for any of the parts separately, but only when in combination to carry out my said invention; but what I do claim as of my invention are—

"First, for the construction of ships and other vessels that navigate on water with an iron frame, combined with an external covering of timber planking for the sides, bilges, and bottoms.

"Secondly, for the making of the butt-joints of the external covering of wood, as described.

"Thirdly, for the combination of an iron frame with a timber keel.

"Fourthly, for the combination of an iron frame with a timber stem.

"Fifthly, for the combination of an iron frame with a timber stern-post.

"Sixthly, for the construction of iron frames for ships or other vessels navigating on water, adapted to an external covering of timber planking for the sides, bilges, and bottoms, as described.

"Seventhly, for an iron keel-plate continued up at each end of the vessel to form the stem and stern-plates, to which the timber keel, the timber stem, and the timber stern-post are fastened.

"Eighthly, for two methods of constructing the keelson. The first, as described, on the top of the floorings, with the extremities of a curvilineal form, and fastened to the stem and stern-plate to keep the ends of the vessel from drooping; for the second method of putting the keelson down upon the keel-plate abutting the ribs, so as to fasten the keelson to the keel-plate, also abutting the floorings, so as to fasten the keelson to the ribs.

"Ninthly, for the external vertical stringers or binding strakes fastened to the ribs, beams, stem and stern plates, and also to the horizontal stringers on the top of the ends of the beams, as described and shewn.

"Tenthly, for the application of rolled iron of a bridge form

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in the construction of the iron frame of ships or other vessels navigating on water.

"Eleventhly, for the application of a mixture of gutta-percha and black lead to the coating of the bottoms of vessels navigating on water, and such other parts as are made of iron."

Then followed references to the drawings annexed to the specification.

Several witnesses were called on the part of the plaintiffs to prove the novelty and utility of the alleged invention; the novelty consisting in the iron frame-work of the vessel being complete and entire without any external planking or sheathing; whereas every other vessel constructed of iron and timber had been so constructed that in the event of the planking or covering being burnt the frame-work would drop to pieces. One of those witnesses, Mr. Scott Russell, in answer to the following question put by the learned judge, "How is the absence of the iron plating, which you say is a material part of the strength of an iron ship, compensated for in Jordan's ship?" said, that, in Jordan's invention, so much of the iron plating as is most useful in an iron ship to give it strength was retained, in order to give that strength to his combination; and that the parts of the iron plating which were left out were those which kept out the water, but did not strengthen the ship.

It was objected on the part of the defendant, that the alleged inventions in the first, second, third, fourth, fifth, and ninth claims, or some of them, were not new, or the proper subject of a patent; that the specification was insufficient and claimed too much, being in effect a claim for the construction of ships with any description of iron frame combined with an external covering of timber, which was shewn by the plaintiffs' own evidence not to be new, and not sufficiently describing the invention or distinguishing between what was old and what new; and for this *Harwood* v. *Great Northern Railway Company* (1) was relied on.

The learned judge declined to nonsuit the plaintiffs, but reserved the points.

Several witnesses were then called on the part of the defendant,

(1) In Q. B., 2 B. & S. 194; 29 L. J. (Q.B.) 193. In Ex. Ch., 2 B. & S. 222; 31 L. J. (Q.B.) 198. In H. of L., 35 L. J. (Q.B.) 27.

who deposed that the construction of ships with a combination of wood and iron was well known and in use long before the date of Jordan's patent; and several specifications were put in, describing a variety of similar inventions: amongst others, specifications of a patent granted to one Walters in 1814, to one Dickenson in 1821, to one Watson in 1839, and to one Ditchburn in 1841. Watson's patent was in effect for a timber ship strengthened with iron tyes and an occasional rib of iron. Dickenson's patent was for a complete iron vessel constructed with plates of iron, the edges of which were turned up and rivetted together (being, as one of the witnesses described it, a series of tea-trays), and planked with timber. There was, however, no evidence that this had ever been brought into use. Watson's patent was for a vessel constructed with iron ribs connected by wooden beams at the top, and bolted to a timber keel. Ditchburn's patent was for a vessel with iron ribs kept together by means of timber stringers placed diagonally inside, and plated with iron, with a timber keelson and timber keel. This last was mainly relied on as containing all the elements of Jordan's invention.

The infringement was not disputed.

The learned judge left it to the jury to say whether at any time before the date of Jordan's patent any ship had been constructed with a complete iron frame and an external coating of timber planking for the sides, bilges, and bottoms.

The jury having found for the plaintiffs,

Bovill, Q.C., in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, on the grounds,—first, that the alleged inventions in the first, second, third, fourth, fifth, and ninth claims of the specification respectively, or some of them, were not the proper subject-matters for a patent; secondly, that they were not new; thirdly, that the specification was insufficient, that it claimed more than it ought to have done, was too wide in its terms, did not sufficiently describe the invention, and did not distinguish what was new from what was old; or for a new trial, on the grounds,—first, that the verdict was against the evidence; secondly, that the judge misdirected the jury in not drawing their attention sufficiently to Ditchburn's specification, or to the question and the evidence as

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to stringers; or why in this respect the Court should not dispose of the questions on the evidence.

Grove, Q.C., Aston, and *Ledgard,* shewed cause. The objections apply mainly to the first, fifth, and ninth claims in the specification. No question now arises as to the infringement; and, if the patent is sustainable, there can be no doubt that the invention is a most valuable one. The substance of it is, the construction of a vessel with a complete iron frame or skeleton, with a covering or skin of timber,—a combination never before suggested in ship-building, though timber and iron had commonly been used together in a variety of other ways; but in all these cases the vessel depended for its tenacity upon its wooden beams, keelson, and stringers. Taken by itself, no doubt, the first claim in this specification would seem to be for any iron frame of a ship, and therefore too general; but the whole specification must be read together, and the sixth claim shews that it is confined to the iron frame with the combination as described. The case of *Harwood* v. *The Great Northern Railway Company* (1) has no application. The decision there ultimately turned upon the absence of novelty, all difficulty as to which in this case is disposed of by the finding of the jury. The mere application of a well-known mechanical contrivance, or a known material, to an analogous purpose, cannot of course be the subject of a patent. But this is a patent for a new combination. Prior to Crane's patent, the use of hot-blast in the smelting of iron was well known, but the combination of hot-blast with anthracite was held to be a good subject for a patent: *Crane* v. *Price.* (2) Until tried, no one could say whether or not the combination claimed in this patent would be successful. It might be that extremes of heat and cold would so affect a vessel constructed on Jordan's plan as to render it useless.

[BYLES, J. The difference between the invention claimed by Jordan and those of all preceding patentees seems to be, that in the former it is the skeleton which gives strength to the structure, whereas in all the others reliance is placed upon the timbers and external coating to give strength and tenacity.]

(1) In Q. B., 2 B. & S. 194; 29 L. J. (Q.B.) 193. In Ex. Ch. 2 B. & S. 222; 31 L. J. (Q.B.) 198. In H. of L., 35 L. J. (Q.B.) 27.

(2) 5 Scott, N. R. 338; 4 M. & G. 580.

Precisely so.

Bovill, Q.C. (*Webster, Q.C.*, and *Macnamara*, with him), in support of the rule. The sixth claim in this specification may possibly be a good subject for a patent. The defendant is not now interested in disputing it. He has not infringed that. That which the patentee claims by his first claim is, the construction of ships with an iron frame combined with an external covering of timber planking for the sides, bilges, and bottoms. That clearly is too wide. The evidence abundantly shewed that vessels had long been constructed with iron ribs, with stringers of all sorts, covered with planking or with iron plates. Ditchburn's patent especially shewed an invention in all respects analogous to Jordan's. The case falls precisely within the decision of the House of Lords in *Harwood* v. *The Great Northern Railway Company*. (1) There, letters-patent were granted to W. for an alleged invention of fishes and fish-joints for connecting the ends of rails used on railways. The fishes were made of iron, with a groove on the outer surface for the purpose of preventing the square heads of the bolts passing through them, and the rails from turning round, and also for the purpose of procuring greater strength with an equal weight of metal than could have been obtained for a fish of the same thickness throughout. Before these letters-patent had been granted, grooved iron plates with bolts let into the grooves had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. In one case of a bridge, a channelled plate with bolts had been used for the purpose of fishing a scarf-joint, where the ends of two timbers met together. And it was held by the House of Lords, affirming the judgment of the Exchequer Chamber, that there was no novelty in the invention, and therefore that the patent was bad; that the supposed invention had been in use previously to the date of the patent, not only in the case of the bridge, but for other purposes; and that a patent could not be upheld for the mere application of a well-known mechanical contrivance to a purpose which was analogous to the manner or to the purpose in or to which it had been hitherto notoriously used or applied.

[BYLES, J. Is there not this distinction between this case and

(1) 35 L. J. (Q.B.) 27.

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the case last cited, viz. that in the one the patent is for the application of an analogous contrivance to the same purpose, and, in the other, the application of the same contrivance to an analogous purpose ?]

In principle it is submitted the two cases are strictly identical; as also are the cases of *The Patent Bottle Envelope Company* v. *Seymer* (1); *Horton* v. *Mabon* (2); and *Ormson* v. *Clarke*. (3)

The Court here intimated that, if they desired to hear any further argument, they would call upon the learned counsel again.

Cur. adv. vult.

April 27. The judgment of the Court (Erle, C.J., Willes, Byles, and Keating, JJ.) was delivered by

BYLES, J. This was a patent for "Certain Improvements in the Construction of Ships and other Vessels navigating on Water."

The jury found a verdict for the plaintiff, on several questions left to them, but it was objected by the defendant that the alleged invention could not be the subject of a patent; and that point was reserved for the decision of the Court.

The first and principal claim in the specification is for the construction of ships with *an* iron frame combined with an external covering of timber planking for the sides, bilges, and bottoms. The only other claim necessary to be mentioned is the sixth, which is for the construction of iron frames adapted to an external covering of timber for the sides, bilges, and bottoms, *as described*. The validity of the sixth claim, which is for a complete and strong iron frame of a definite construction, was not disputed at the bar, as far as the present action is concerned.

It was contended by the counsel for the defendant that the expression "iron frame" in the first claim was not confined to an iron frame such as that specified in the sixth claim, but comprehended whatever might, according to the ordinary use of language, be called "an iron frame" for a ship. And, on a careful consideration of the specification, we are of that opinion.

(1) 5 C. B. (N.S.) 164; 28 L. J. C.P.) 22.

(2) 12 C.B. (N.S.) 437; 31 L.J. (C.P.) 255; in error, 16 C. B. (N.S.) 141.

(3) 13 C.B. (N.S.) 337; 32 L. J. (C.P.) 8; in error, 14 C. B. (N.S.) 475; 32 L. J. (C.P.) 291.

The counsel for the plaintiffs laid much stress on the rigidity and strength of the model produced at the trial, and made in conformity with the sixth claim. Those qualities would be very material if we were considering the merits of the sixth claim itself; but we find nothing in the specification requiring any definite degree of rigidity or strength, or any peculiarity of construction in the frame mentioned in the first claim. The first claim, therefore, is, according to our construction, a claim for planking with timber any iron frame of a ship.

Questions of this nature must of course depend very much on the extent to which scientific and practicable knowledge of the subject had been carried at the date of the patent. The evidence (from which, by the arrangement made at the trial, we are at liberty to draw inferences consistent with the findings of the jury) shewed,—what, indeed, is common knowledge—the extensive use of iron as a material in ship-building, and, amongst other things, that composite ships, partly of iron and partly of wood, had frequently been constructed; that frames partly of iron and partly of wood had been coated with iron; and that the iron coating of iron vessels had been placed upon iron frames of more or less strength and completeness.

Then arises the main question in the cause,—iron and wood being both of them materials long used for the construction of the frame and coating of vessels,—can the application of wooden planking to the iron frame of a vessel (without any peculiarity in the nature of that planking) be the subject of a patent? We think it cannot. It is not only the substitution of one well known and analogous material for another, that is, wood for iron, to effect the same purpose, on an iron vessel, but it is the application of the same old invention, viz. planking with timber, which was formerly done on a wooden frame, to an analogous purpose, or rather the same purpose, on an iron frame.

In this view of the case, the recent decision of the Exchequer Chamber and of the House of Lords in *Harwood* v. *The Great Northern Railway Company* (1) appears to us to be in point, and decisive for the defendant. There, grooved fish-plates having been before used for fastening the scarf-joints of timbers, a patent was

(1) In Ex.Ch. 2 B. & S. 222; 31 L. J. (Q.B.) 198. In H. of L., 35 L. J. (Q.B.) 27.

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taken out for their application to fastening the butt-joints of iron rails; and it was held that the patent was bad, because it claimed the applicatian of an old contrivance to an analogous purpose.

The result is that the verdict must be entered for the defendant on all the issues involving this question.

Rule absolute accordingly.

Attorneys for plaintiffs: *Wilson, Bristowes, & Carpmael.*
Attorneys for defendant: *Loftus, Vizard, & Co.*

May 24.

CARR AND ANOTHER *v.* THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

Shipping—Charterparty—Substituted Contract—Construction of Guarantee—Time of Breach.

The defendants chartered two vessels of 300 tons each for a voyage from Ibraila to London with full cargos of petroleum, at 84*s.* per ton. In consequence of their stores at Ibraila having been destroyed by fire, they were unable to furnish any oil; and the owners agreed to cancel the charterparties and to procure other cargos upon the defendants guaranteeing each vessel "a sum of 900*l.* gross freight home." The homeward cargos shipped under the substituted contract fell short of the guaranteed sum for each vessel by 343*l.* 6*s.* One of the vessels arrived in safety; the other was lost:—

Held, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one.

THE declaration stated, that, before the making of the agreement thereinafter mentioned, the plaintiffs, being the owners of two vessels named respectively the *Izamados* and the *Botassis*, had chartered them to the defendants for the conveyance of petroleum oil from Ibraila to London, for freight payable in that behalf by the defendants to the plaintiffs, which charterparties at the time of making the said agreement the defendants were unable to fulfil; and thereupon it was agreed between the plaintiffs and the defendants that the said charterparties should be cancelled, and that the defendants should guarantee to the said vessels a sum of 900*l.* each gross freight home from Ibraila to England, on the understanding that

the plaintiffs should place the vessels at once on the most profitable charter or trade procurable, and that the vessels would carry 300 tons each of whatever cargo they might take on board, or, should they not take 300 tons each, that a proportionate reduction of the guarantee should be made for any lesser quantity of cargo they might take: Averment, that the plaintiffs, relying on the said agreement, consented to cancel the charterparties, and that the same were cancelled accordingly: General averment of performance: Breach, that the defendants made default in performance of the guarantee in this that they did not guarantee to the said vessels or either of them a gross freight home from Ibraila to England of the stipulated amount; and, although the said vessels earned by way of gross freight a sum far less than the stipulated freight, the defendants did not make good to the plaintiffs the deficiency, but therein made default, &c. Common counts.

Pleas,—first, that the defendants did not agree, as alleged,—secondly, that the plaintiffs did not place the said vessels respectively at once on the most profitable charter or freight procurable,—thirdly, that the ships did not respectively take cargos on board as alleged, and did not carry 300 tons each of such cargos as they respectively took on board, but a far less quantity respectively; that thereupon a proportionate reduction according to the terms of the agreement being made in the amount of the said gross freights by the defendants guaranteed to the plaintiffs, the gross freights of the said cargos were not less than the reduced amounts so guaranteed; and that the quantities so taken were respectively full cargos, and all that the said vessels respectively could carry of the said goods,—fourthly, that the defendants had not notice of the deficiency of the said gross freights or either of them at any time before suit,—fifthly, that the said vessels did not respectively earn by way of gross freight sums less than the stipulated freights respectively,—sixthly, that the plaintiffs did not employ the said vessels or either of them for the purposes contemplated by the said agreement, and, contrary to the agreement, employed the same and each of them for other and different purposes, and prevented the said vessels and each of them from being employed according to the agreement,—seventhly (to the common counts), never indebted. Issue thereon.

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CARR v. WALLACHIAN PETROLEUM COMPANY.

The cause was tried before Erle, C.J., at the sittings in London after last Hilary Term. The plaintiffs are merchants and ship-owners carrying on business in London. The defendants are a joint-stock company established with limited liability under The Companies Act, 1862, 25 & 26 Vict. c. 89, having their chief office in London. By charterparties dated respectively the 9th and 10th of August, 1864, the defendants chartered of the plaintiffs the two ships *Izamados* and *Botassis* for a voyage from Ibraila, in the Danube, to London, with a full cargo of petroleum oil, at a freight of 84*s.* per ton. Shortly after the charterparties had been entered into, the defendants received intelligence that their premises at Ibraila with the whole of their stock of petroleum had been destroyed by an accidental fire. They thereupon informed the plaintiffs that they would be unable to provide cargos for the two vessels, and requested them to cancel the charterparties. After some negotiation, the plaintiffs consented to do this upon receiving from the company a guarantee; and the following minute was made in the company's book:—

"6th of September, 1864. Mr. Housden attended on the part of Messrs. Carr & Co. for the purpose of conferring with the directors on the subject of cancelling the charters of the *Botassis* and the *Izamados*. It was proposed by the directors that this company will guarantee the above-named vessels a sum of 900*l.* each gross freight home, on the following understandings:—

"That Messrs. Carr & Co. place the vessels named at once on the most profitable charter or trade procurable:

"That the vessels will carry 300 tons each of whatever cargo they may take on board, or, should they not take 300 tons each, that a proportionate reduction of the guarantee should be made for any lesser quantity of cargo they may take:

"That the charterparties dated the 9th and 10th of August last respectively for the vessels named be cancelled."

Upon this minute being communicated to the plaintiffs they instructed their agents in the Danube to procure other charters for the ships; and ultimately both vessels were laden at Kilia with barley for London, and despatched. The *Izamados* arrived in safety, but the *Botassis* with her cargo was totally lost. The estimated freight at the current rate for barley fell short of the

900*l.* guaranteed on each vessel by 343*l.* 6*s.*, and accordingly the plaintiffs claimed to be entitled to recover in this action 686*l.* 12*s.*

On the part of the defendants it was submitted that they were not liable for the deficiency of freight on the lost vessel, but that the loss should have been covered by insurance.

Under the direction of his Lordship a verdict was taken for plaintiff for 686*l.* 12*s.*, leave being reserved to the defendants to move to reduce it by 343*l.* 6*s.* if the Court should be of opinion that the plaintiffs were not entitled to recover in respect of the *Botassis*.

Watkin Williams, in Easter Term last, obtained a rule nisi accordingly.

Sir G. Honyman (*Field, Q C.*, with him), shewed cause. The loss of the *Botassis* can have no effect upon this contract. The plaintiffs having a right of action against the defendants for their inability to perform their contracts, the defendants guaranteed that goods should be put on board the two ships which should produce to each of them a gross freight of 900*l.* That contract was broken the moment a cargo was shipped which was incapable of realizing that amount of freight; and the right of action then vested in the plaintiffs could not be divested by the subsequent loss of either ship. The case of *Yeames* v. *Lindsay* (1) is precisely in point. There, the defendants, having chartered a vessel to proceed to Taganrog, and there load a cargo at 60*s.* per ton, wrote to the plaintiffs: "Inclosed please find three copies of charter per *William and Mary*, from the Azof, and we shall feel obliged by your sending instructions to your firm at Taganrog to re-charter for us upon the best terms obtainable, and we hope you may be able to place her at advantage; but if unfortunately there should be any loss, your draft upon us for the difference will meet with due honour." At the time the vessel arrived at Taganrog the rate of freight was 40*s.* per ton, and, as the plaintiffs could not get more, they put their own cargo on board at that rate, drawing upon the defendants for the difference between that and 60*s.*, at which rate they would have to pay the owner in England when the vessel arrived. The vessel was lost, and the defendants refused to accept the plaintiffs' bill, on the

(1) 3 L. T. (N.S.) 855.

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ground that, inasmuch as the ship never arrived at her destination, the plaintiffs were not liable for the freight, and, as they had chartered her to themselves and not to third persons, they had not paid away any money, and therefore they had sustained no such loss as was contemplated in the letter. This Court, however, held that, as the moment the cargo was put on board there was a difference in the insurable value, as it then became liable to a freight of 60*s.* instead of 40*s.*, there was such a loss sustained as was in contemplation at the time of the contract.

Watkin Williams (with him *E. James, Q.C.*), in support of the rule. If this had been an action upon a charterparty to recover freight at the rate of 3*l.* per ton, it could not have been contended for a moment that the owners, in the event which has happened, were entitled to recover freight in respect of the *Botassis*. The substituted agreement did not alter the relation of owners and charterers, but only modified the terms of the contract. There could be no breach of that substituted agreement until the deficiency of freight was ascertained by the arrival of the two vessels. The contingency of the loss of both or either of them might have been provided for by an insurance.

ERLE, C.J. I am of opinion that this rule should be discharged. The question turns upon the meaning of the memorandum by which the defendants guaranteed to each of the two vessels a freight home of 900*l.* gross. This was a substituted contract, and is to be construed with reference to the original charterparty. That assumes the capacity of each vessel to be 300 tons, and provides for a freight of 84*s.* per ton. The owners stipulate for a full cargo of petroleum. In consequence of a misfortune at the contemplated place of shipment, the charterers were unable to supply any cargo. A new contract was thereupon substituted, under which the owners were to take any other cargo they could procure, the defendants guaranteeing that they should at least receive 900*l.* gross freight for each vessel. If the original contract had been still subsisting, and the defendants had only put on board each vessel 150 tons of petroleum instead of 300 tons, the contract would have been broken at that time. So, the gross amount of freight on the cargos loaded at Kilia falling short of the

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guaranteed sum, the contract was broken at the port of shipment. The ambiguity arises from the improper use of the word "freight."

WILLES, J. I am of the same opinion. The substituted agreement is a mere arrangement of the amount. In all other respects it stands upon the same footing as the original contract. The liability of the defendants for not loading a full cargo was complete at the same time that it would have been under the charterparty. And they are not the less liable because one of the vessels was lost on the voyage home. If the original contract had been fulfilled, peradventure the loss would not have taken place. In estimating the damages, therefore, for the defendants' breach of contract, the loss of the *Botassis* is out of the question.

BYLES, J. I am of the same opinion, though I must confess I have arrived at it with considerable difficulty. The defendants have guaranteed that the *Izamados* and the *Botassis* shall have a gross freight home of 900*l.* each from Ibraila. The contract was broken when a full cargo was shipped at Kilia which was unequal to the guaranteed freight. I think the amount claimed was the proper amount payable to the plaintiffs for that breach.

MONTAGUE SMITH, J. I am of the same opinion. Whether the guarantee was performed or not must be ascertained at the time the cargo was put on board. The plaintiffs' right to compensation for the breach is not in any degree affected by the subsequent loss of the *Botassis*.

Rule discharged.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorney for defendants: *A. E. Tower.*

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May 26.

SCARTH *v.* RUTLAND.

Attorney—Delivery of Bill—Agreement for a specific Sum.

In the absence of a plea of no signed bill delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill and shewing charges fair and reasonable amounting to or exceeding the stipulated sum.

DECLARATION for work and labour done by the plaintiff as attorney for the defendant. Plea, never indebted. Issue thereon.

At the trial, before the under-sheriff of Middlesex, it appeared that the plaintiff had been employed under a verbal contract to obtain the defendant's discharge under the Bankruptcy Act, for a stipulated charge of 10*l.* 10*s.*, of which 7*l.* had been paid on account; and that the plaintiff afterwards sent in a bill claiming for his services on that occasion a sum of 14*l.* 16*s.* 4*d.* There was no plea of no signed bill delivered; nor was any evidence given by the plaintiff of the reasonableness of the charges.

It was contended on the part of the defendant that it was not competent to the plaintiff to set up a contract for a specific sum for costs, unless he also shewed that his reasonable bill of costs for the work done would amount to or exceed that sum.

The under-sheriff overruled the objection; and, in his summing up, he told the jury that there was no law to preclude an attorney from commuting his charges and making a bargain for a fixed sum for business which he is about to undertake, provided such sum be not exorbitant: and under his direction the jury returned a verdict for the plaintiff, damages, 3*l.* 10*s.*

Eyre Lloyd moved for a new trial on the ground of the improper reception of evidence; and contended that the plaintiff ought not to have been allowed to give evidence of a contract to do the work for a specific sum, without going on to shew that a bill had been delivered and that the charges were fair and reasonable, and amounted to that sum; and he referred to *Philby* v. *Hazel* (1), where it was held that an agreement by an attorney to receive a gross sum and costs out of pocket, in lieu of costs to be incurred, is not a void

(1) 8 C. B. (N.S.) 647; 29 L. J. (C.P.) 370.

agreement, but that the bill is nevertheless taxable, and therefore that the delivery of a bill containing a charge for business done, the particular items being left in blank, and only those carried out in figures which consisted of actual disbursements, was not such a "delivery of a signed bill" as is contemplated by the 6 & 7 Vict. c. 73, s. 37.

ERLE, C.J. All that that case amounts to is, that, notwithstanding an agreement limiting the attorney's claim, he must deliver a bill, and the client may tax it, and on the result of such taxation the attorney may be entitled to less, but cannot recover more, than the agreed sum. Here, however, the defendant was not in a position to object to the non-delivery of a signed bill.

MONTAGUE SMITH, J. There is nothing to prevent an attorney from cutting down his own claim.

WILLES and BYLES, JJ., concurred.

Rule refused.

Attorney for defendant: *T. W. Parkes.*

MACANDREW AND OTHERS *v.* CHAPPLE AND ANOTHER.

May 29.

Ship and Shipping—Charterparty—Delay—Deviation—Condition precedent.

A charterparty contained a clause that the ship should "with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to E., and there load a full cargo of cotton." This the freighters bound themselves to ship. The ship deviated to C. and arrived at E. a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of this delay.

In an action against the freighter for not loading a cargo:—

Held, that the above clause was a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighter for refusing to load a cargo; but that his remedy for any damage that had accrued by reason of the delay was by cross-action.

Semble, by Willes, J. If the delay had entirely defeated the object of the freighters in taking up the vessel it would have afforded an answer to the action.

THIS was an action brought by the plaintiffs against the defendants for the recovery of damages for the loss sustained by them, by reason of the defendants having made default in shipping a cargo

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on board the plaintiffs' vessel *Ephesus;* and by consent a case was stated without pleadings, of which the following were the material parts:

The plaintiffs were the owners of the steamer *Ephesus.* On the 15th of October, 1864, the steamer was launched at Newcastle, and was immediately afterwards placed in the hands of Messrs. Randolph, Eldon & Co., engineers, for completion ready for sea. About the 1st of December, 1864, negotiations were opened between the plaintiffs and defendants for the purpose of the chartering of the *Ephesus* by the defendants. On the 7th of December these negotiations were concluded by a charterparty being made between the plaintiffs and defendants, containing the following terms: "It is this day mutually agreed that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit, direct, or on the way proceed to Alexandria, Egypt, or so near thereunto as she may safely get, and there load from the factor of the said freighters, in the customary manner, a full and complete cargo of cotton . . . which the said merchants bind themselves to ship . . . and being so loaded shall forthwith proceed to London or Liverpool direct as ordered on signing bill of lading."

It is usual for steamers to make a trial trip before starting on their first voyage, and in order to have a satisfactory trial trip at Newcastle, it is necessary for steamers to put out to sea, having to cross and re-cross the bar at the mouth of the Tyne, an operation accompanied by some risk in the case of a steamer of the size of the *Ephesus* at that period of the year. It was arranged therefore that the vessel should make her trial trip from Newcastle to London, instead of returning to the Tyne, and that the deficiencies of her machinery, if any, should be made good in London. Accordingly on the 12th of January, 1865, the ship left Newcastle for London. While in London the ship took on board goods for Malta, Syra, Constantinople, Smyrna, and Alexandria, but no delay was thereby occasioned, the goods being shipped before the necessary repairs to the machinery were complete. The ship sailed from London on the 1st of March, 1865, for Malta, and after touching and unloading cargo there, and at Syra, Constantinople, and Smyrna, arrived at

Alexandria on the 29th of April, 1865, and was ready to load cargo on the 1st of May, 1865. The ship when she sailed from Newcastle was not complete and ready for the chartered voyage. There is no usage of trade by which vessels bound from Newcastle or London to Alexandria are justified in taking goods to Syra, Constantinople, Smyrna, or other ports, if the geographical position of such ports does not warrant such a course.

Had the *Ephesus* sailed direct from London to Alexandria, and discharged her outward cargo there instead of taking cargo to the various ports at which she touched on her way out, she would have been ready to load her homeward cargo at Alexandria a few days before the 1st of May, 1865.

Freight for cotton fell gradually and continuously from the month of January, 1865, to the month of May, 1865.

On the 5th of May, John Collings, the master of the *Ephesus* not having received any cargo from Charles Grace, the person named by the defendants as their agent, formally demanded a cargo from him, whereupon the latter informed him that he had no cargo for him, and that he must therefore seek a cargo elsewhere for his vessel. The master accordingly did the best he could, but was unable to obtain more than a small freight.

The question for the opinion of the Court was, whether, under the aforesaid circumstances, the plaintiffs had a right of action against the defendants for refusing to load the *Ephesus* at Alexandria as aforesaid. The Court or court of appeal to be at liberty to draw all such inferences of fact as a jury would be entitled to do.

Mellish, Q.C. (*Cohen* with him), for the plaintiffs. The question is, whether there was such a delay in bringing the ship to Alexandria as entitled the charterer to refuse to load. The ship was only to sail when ready, and there was no unnecessary delay in getting her ready. The defendants, therefore, must rely on one of two breaches of the charterparty: either that the vessel was not any way fitted for the voyage at the time she left the Tyne, or that she did not proceed direct to Alexandria, but went to ports other than those to which she was entitled to go. It is clear on authority that where a vessel is chartered for a homeward voyage, a stipulation that she should be staunch, &c., at starting, is not a condition pre-

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cedent to the duty of the charterer to provide a cargo, and the same is true of the stipulation that she shall proceed on the voyage with all convenient speed, otherwise an hour's delay in starting would entitle the charterer to throw up the charterparty. Some of the cases indeed seem to shew that if these stipulations are broken to such an extent as entirely to frustrate the object of the voyage, the charterer may throw up the agreement; but here the ship was seaworthy when she arrived at Alexandria, and the only effect of the delay (if there was any) was that freights were somewhat lower when she arrived. It did not prevent a cargo of cotton being shipped, which was the object for which the ship was chartered. Neither is the stipulation to proceed to Alexandria direct a condition precedent. The port of London was on the way, as the vessel necessarily passed the mouth of the Thames; and the vessel had a right to load as well as unload there. Proceeding to Constantinople was, no doubt, a deviation in terms; but *Clipsham* v. *Vertue* (1) and *Tarrabochia* v. *Hickie* (2) shew, distinctly, that if the object of the voyage be not frustrated, the charterer is not relieved, either by deviation or delay, of his obligation to load a cargo. It is not necessary to support or disprove what has been said with respect to cases in which the object of the voyage is frustrated. *Freeman* v. *Taylor* (3) first gave rise to the opinion that the charterer would then be relieved from his engagements.

[Byles, J. We had all the cases on this subject before us in *Seeger* v. *Duthie*. (4)]

The defendants may rely on *Behn* v. *Burness* (5), in which the description of a ship in the charterparty as "now in the port of Amsterdam," was held to make it a condition precedent that the ship should be there, but the words in that case were either a condition precedent or nothing; they clearly were not a stipulation upon which a cross-action could be brought. In the judgment in that case, *Dimech* v. *Corlett* (6) is referred to, and the judges intimate their dissent from the doctrine that a breach of a mere stipulation, even if it frustrates the object of the voyage, can, therefore, be treated as a warranty, and held to avoid the agreement.

(1) 5 Q. B. 265; 13 L. J. (Q.B.) 2.
(2) 1 H. & N. 183; 26 L.J. (Ex.) 26.
(3) 8 Bing. 124; 1 L. J. (C.P.) 26.
(4) 8 C. B. (N.S.) 45; 29 L.J. (C.P.) 253; in error, 8 C.B. (N.S.) 72; 30 L.J. (C.P.) 65.
(5) 3 B. & S. 751; 32 L.J. (Q.B.) 204.
(6) 12 Moo. P. C. 199.

E. James, Q.C. (*Watkin Williams* with him), for the defendants. Whether a stipulation be a condition precedent or not depends upon the intention of the parties, and not on any subsequent events: *Behn* v. *Burness*. (1) It can make no difference whether the damage caused is great or small; whether the delay is one day or one hundred. The charterparty in the present case is one for a voyage from Newcastle to Alexandria, and the shipowners agree to proceed on that voyage with all convenient speed. It is clearly a condition precedent that he should do so without deviating. In *Clipsham* v. *Vertue* (2), there was no stipulation that the ship should proceed *direct* to London.

ERLE, C.J. In this case the charterers have not performed their part of the agreement, and defend themselves on the ground that a condition precedent has been broken by the shipowners. A charterparty may contain either a stipulation or a condition precedent, and the question whether any provision in the contract is one or the other is a matter of construction, and depends on the judgment which the Court may form of the intention of the parties. This charterparty says that the *Ephesus* being every way fitted for the voyage, shall with all convenient speed proceed to Alexandria. I am of opinion that there is nothing to shew that it was the intention of the parties that this should be a condition precedent; if it were so, either of the deviations suggested—viz. to London in the first instance, and to Constantinople in the second—would be sufficient to render the contract void. I think the parties could not have intended that if it was broken ever so little the charterers should be free. The present case turns only on the construction of the charterparty; and I think the clause in question amounts to a stipulation for the breach of which the remedy is by cross action, and not to a condition precedent. It is unnecessary to go into the cases which have been cited with reference to the doctrine that where the whole object of the voyage has been frustrated there is an answer to the action, as it is admitted that such was not the case in the present instance.

WILLES, J. I am of the same opinion. The defendants seek to set up a deviation or delay in sending out the ship as an excuse for

(1) 3 B. & S. 751; 32 L.J. (Q.B.) 204. (2) 5 Q. B. 265; 13 L.J. (Q.B.) 2.

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not having loaded a cargo on board it, as agreed by the charterparty. It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this court, that a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter. From the time of *Boone* v. *Eyre* (1), *Ritchie* v. *Atkinson* (2), and *Davidson* v. *Gwynne* (3), this rule has been applied. In the present case I apprehend the breaches resolve themselves into such a delay as can be compensated for by damages. The vessel was not engaged for any particular cargo, but the contract was merely a speculation on the rise or fall of freight; and the object of the voyage, therefore, was in no sense frustrated.

BYLES, J. I am of the same opinion. The principles upon which it is to be determined whether a stipulation in a contract is a condition precedent are laid down by Erle, C.J., in *Seeger* v. *Duthie*. (4) Here there is the ordinary express stipulation that the ship shall proceed with all convenient speed. If the parties intended this to be a condition precedent, their intention must be implied, for there are no express words shewing such an intention. If such a stipulation was held to be a condition precedent, every actionable delay would avoid the contract, and a large number of charterparties would be defeated. What would be the effect if the delay was such as entirely to frustrate the object of the voyage is a question which does not arise here. Then, secondly, as to the deviation: this question is concluded by *Freeman* v. *Taylor* (5); there the ship deviated to the Mauritius, but the stipulation was held not a condition precedent, and the charterparty not to be avoided. The deviation to Constantinople is no doubt an actionable breach of the stipulation that the ship should proceed direct to Alexandria, but is no answer to the action.

MONTAGUE SMITH, J. I am of the same opinion. Here the

(1) 1 H. Bl. 273 n.
(2) 10 East, 295.
(3) 12 East, 381.
(4) 8 C. B. (N.S.) 45; 29 L. J. (C.P.) 253; in error, 8 C. B. (N.S.) 72; 30 L. J. (C.P.) 65.
(5) 8 Bing. 124; 1 L. J. (C.P.) 26.

one question is, whether the stipulation to proceed with all convenient speed direct to Alexandria is a condition precedent or not. I am clearly of opinion that it is not, and that if we held that it was we should frustrate the intention of the parties. The loss does not go to the whole consideration, but may be compensated in damages; and the question as to what would have been the case if the object of the voyage had been frustrated does not arise.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Field, Roscoe, & Co.*
Attorneys for defendants: *Cotterill & Sons.*

COULTHURST and Another *v.* SWEET. *May* 30.

Shipping—Authority of Agent—Liability of Joint Owner—Construction of Bill of Lading—Custom as to weighing.

Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "*nett weight delivered.*" On arrival in London, the agent appointed by the managing owner demanded freight *on the weight mentioned in the bill of lading*, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against the defendant,—one of the joint owners,—to recover back the excess. The jury having negatived the alleged custom:—

Held, that the defendant was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, and that no part of the money had come to his hands.

This was an action for money received, money paid, and money found due upon accounts stated. Plea, never indebted.

The cause was tried before Pollock, C.B., at the last spring assizes at Kingston. The facts were as follows:—The plaintiffs are the proprietors of the Phœnix Colour Works at Bristol. The defendant and three other persons resident in Glasgow were joint owners of the ship *Edinburgh Castle*, of the port of Glasgow; one of them, who carried on the business of a ship and insurance-broker there under the name of Skinner & Co., acting as ship's husband.

In June and July, 1865, 34,906 bundles of bark, described in

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the bill of lading as weighing nett 3314 picals, and 6028 bundles described as weighing 602 picals, were shipped by Messrs. Fraser & Co. at Penang, to be delivered at the port of London "unto shippers' order, or to their assigns, he or they paying freight for the said goods at the rate of 3*l.* sterling per ton of 20 cwt. nett weight delivered." (1)

The vessel arrived in the port of London on the 26th of December, 1865. The plaintiffs, to whom the bark was consigned, instructed the Bristol manager of the Great Western Railway Company to cause it to be cleared, and to pay the freight and forward the bark to Bristol by rail. The company's agent in London accordingly demanded the bark, and sent lighters alongside the ship to receive it for conveyance to their wharf at Brentford, which is beyond the limits of the port of London, offering to pay the freight according to the bills of lading, at the rates of 3*l.* and 1*l.* 15*s.* respectively per ton of 20 cwt. nett weight delivered. The owners of the *Edinburgh Castle*, however, through Mackenzie, a broker in London employed by the managing owner, demanded freight upon the quantities mentioned in the bills of lading, which, the bark being in a green state when shipped, would necessarily considerably exceed the nett weight delivered in London. After much negotiation, Mackenzie on behalf of the owners consented to deliver the bark on payment of freight upon the weight delivered, but claimed under an alleged custom to have the weight ascertained by weighing the bark over the ship's side *at the consignees' expense*. The plaintiffs declined to accede to this, and, in order to obtain the bark, paid the sum demanded by Mackenzie (65*l.* 9*s.* 7*d.*) under protest. The bark was taken to the railway company's premises at Brentford and weighed, the nett weight being found to be 193 tons 10 cwt. 3 qrs. The plaintiffs thereupon brought this action to recover back the sum they had been compelled to pay in excess of the amount really due, viz. 109*l.* 12*s.* 1*d.*

There was no evidence to shew that the defendant had in any way interfered in the management of the vessel or in the appointment of Mackenzie as agent, or that any part of the money came to his hands.

(1) Under the second bill of lading, for the 6028 bundles, the freight was 1*l.* 15*s.* per cwt.

It was admitted that the whole quantity of bark shipped was taken from the vessel and delivered to the railway company.

Under these circumstances it was contended on the part of the defendant that the action would not lie, the money having been voluntarily paid by the plaintiffs, and that the defendant, though a part owner of the ship, was not liable for the acts of Mackenzie. They also attempted to set up a custom for the consignee of goods shipped in bulk to pay freight according to the weight in the bill of lading, unless they are weighed on board, or at the ship's side, by the dock company, or at a legal wharf or quay, the consignee paying the expense: but none of the witnesses ever knew of this custom having come into litigation.

The jury negatived the custom, and returned a verdict for the plaintiffs for 109*l.* 12*s.* 1*d.*

The learned judge reported to the Court, as follows:—"The plaintiffs claimed to recover back a sum of money paid under protest to obtain possession of the bark in question. The claim to demand and receive the money was founded on the weight in the bills of lading; but, by the contract for freight, the freight was to be paid according to the weight delivered. The defendant set up a custom to take (under the circumstances) the weight in the bill of lading. I thought such a custom not proved, and so the jury found: but I reserved the question whether the defendant was liable."

Francis, in Easter Term last, obtained a rule nisi to enter a nonsuit, on the grounds that the money having been received by the managing owners of the ship without the knowledge or instructions of the defendant, and without his participation in the proceeds, he was not liable; and that the circumstances under which the money was paid did not entitle the plaintiffs to recover it back,—the plaintiffs having the option given to them to have the weight ascertained at the ship's side, or of taking the bark at the bill of lading freight.

Denman, Q.C., and *Horace Lloyd*, shewed cause. The defendant is responsible for the acts of Mackenzie, the agent, who acted under instructions from Skinner & Co., the managing owners. The main ground of objection to the plaintiffs' right to recover

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back the money was, that they had paid it with full knowledge of the circumstances. They were, however, obliged to pay it in order to get the bark which the defendant detained under colour of a custom which the jury negatived. Where the managing owner of a ship employs an agent in the business of the ship, the co-owners are bound by his acts: *Barker* v. *Highley*. (1) There, the ship's husband and managing owner caused a bail-bond to be given in the Admiralty Court, in the names of his co-owner and himself, in a suit for a collision; and, the suit terminating in favour of the plaintiffs, and the bail having been called upon to pay damages, interest, and costs, it was held that the co-owner was responsible to the bail for the money so paid. The duties and powers of a managing owner are defined in Abbott on Shipping. (2) Here, a question arising upon the construction of the bill of lading, the plaintiffs were compelled to pay a larger sum for freight than was due, in order to obtain possession of their goods. How can that be said to be a voluntary payment?

[WILLES, J., referred to *Ewbank* v. *Nutting* (3) and *Tamvaco* v. *Simpson*. (4)]

Francis and *Lord* in support of the rule. No doubt, where a carrier refuses to deliver goods except upon being paid an excessive charge, the excess may be recovered back. But here the plaintiffs had an option given to them, to take the bark at the bill of lading freight or to have it weighed at the ship's side. The latter alternative they declined, on account of the expense. In *The Duke de Cadaval* v. *Collins* (5), Coleridge, J., says: "It is clear that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear, too, that, if there be a bonâ fide legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation." And see the authorities referred to in Chitty on Contracts. (6) Here the claim was quite bonâ fide. The mere fact of a party being registered as owner will not make him liable: it is a question of contract in each case: *Briggs* v. *Wilkinson* (7); *Reeve*

(1) 15 C. B. (N.S.) 27; 32 L. J. (C.P.) 270.
(2) 10th ed., by Shee, p. 72.
(3) 7 C. B. 797.
(4) 19 C. B. (N.S.) 453; 34 L. J. (C.P.) 268. In Ex. Ch. ante, p. 363.
(5) 4 Ad. & E. 858, 867.
(6) 7th ed., by Russell, 569
(7) 7 B. & C. 30.

v. *Davis* (1); *Helme* v. *Smith* (2); *Myers* v. *Willis* (3); *Brodie* v. *Howard* (4); *French* v. *Styring* (5); Chitty on Contracts. (6) The defendant here had no knowledge of the transaction, and got no part of the money; nor was there any evidence of a recognition by him of the appointment of Mackenzie as agent for the vessel, and therefore, upon the authority of *Sims* v. *Brittain* (7) and *Sims* v. *Bond* (8), the defendant cannot be held to be responsible for his acts.

ERLE, C.J. I am of opinion that this rule should be discharged. The discussion which has taken place has turned more upon the facts than upon the law applicable to them. There is no doubt as to the effect of the registry. The defendant is a part-owner. Skinner & Co., as managing owners, had authority to do all things usual in the management of the ship and the delivery of the cargo, and a right to appoint an agent for that purpose. Mackenzie was duly appointed as such agent; and all the part-owners are responsible for acts done by him within the scope of his duty. The bark in question having arrived in the port of London from Penang under bills of lading making it deliverable to the shippers' order or to their assigns, he or they paying freight at a certain rate of freight per ton of 20 cwt. "nett weight delivered," the ship-owners by their agent Mackenzie claimed to be paid freight according to the weight mentioned in the margin of the bills of lading, and they endeavoured to set up a custom to that effect. They clearly had no right to that by custom. Nor had they any right to call upon the merchants to pay them for the weighing of the bark. The plaintiffs, therefore, are entitled to recover back the excess which they were compelled to pay in order to obtain their goods.

WILLES, J. I am of the same opinion. The provision in the bills of lading, for payment of freight "according to the nett weight delivered," was introduced for the purpose of excluding the difficulty arising from the decision of the Exchequer, dissented from by

(1) 1 Ad. & E. 312; 3 N. & M. 873.
(2) 7 Bing. 709; 5 M. & P. 744.
(3) 17 C. B. 77.
(4) 17 C. B. 109.
(5) 2 C. B. (N.S.) 357.
(6) 7th ed., by Russell, 222.
(7) 4 B. & Ad. 375; 1 N. & M. 594.
(8) 2 N. & M. 608.

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one member of the Court, in *Gibson* v. *Sturge*. (1) There, a vessel was chartered to carry a cargo of corn from Odessa to Gloucester for freight payable at a certain rate per quarter. 2664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was weighed at the Queen's beam and found to contain 2785½ quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby the bulk was increased. It was held that the freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge. Martin, B., who differed from the rest of the Court, said: "In my opinion, in the absence of contract upon the subject, what is most just and reasonable, what is most analogous to cases of a similar kind, and what is the most convenient practical rule upon the subject, and the most beneficial to all parties interested, the measurement at the port of delivery affords a test for the ascertainment of freight preferable to that of measurement at the port of loading. If this be found inconvenient in any particular classes of cargo, a few words inserted in the bill of lading would effectually remedy it." A similar question is raised in Jacobsen's Sea Laws. (2) To avoid all doubt as to that, the provision in question was inserted in these bills of lading: but there is no mention as to who is to weigh, or that the weighing is to be by any authorized standard, as at the Queen's beam, or the like. The vessel having arrived, the master or the agent for the managing owners insisted that the merchants, if they took the goods without weighing at the ship's side, must pay freight according to the weight mentioned in the margin of the bills of lading. This was not a mere request for delay in order to give the master an opportunity to weigh the bark, but in order to compel the merchants to pay the expense of the weighing. In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board; but I never heard of the

(1) 10 Exch. 622; 24 L. J. (Ex.) 121.

(2) Baltimore edition, 1818, ch. 3, pp. 256 et seq.

merchant being called upon to pay for it. The plaintiffs claimed to have the bark delivered to them on payment of the freight stipulated for by the bills of lading, viz. 3*l.* per ton nett weight delivered. Mackenzie, acting for the owners of the ship, declined to deliver it except on payment of the freight upon the quantity mentioned in the bill of lading: and, in order to obtain the bark, the plaintiffs were obliged to yield to his demand. They are clearly entitled to recover back the excess. It is a mistake to apply *Sims* v. *Brittain* (1) and *Sims* v. *Bond* (2) to cases of this kind, because money had and received is only a short form which the plaintiffs are entitled to adopt instead of suing for the conversion. *Ewbank* v. *Nutting* (3) is abundant authority to shew that Mackenzie was acting within the scope of his authority, and that the owners are responsible for his act. In the late case of *Tamvaco* v. *Simpson* (4), neither here nor in the Exchequer Chamber was it suggested that the owners were not liable for the conversion of the plaintiffs' goods by the master.

BYLES, J. I am of the same opinion. The money was received here by the managing owner. I adhere to what was said by this Court in *Barker* v. *Highley* (5), viz. that "the ship's husband or managing owner is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight." In the present case, that which the plaintiffs seek to recover back is a portion of the freight which was paid by them in order to obtain possession of their goods. The money was improperly received, and the owners are bound to return it.

MONTAGUE SMITH, J. I am of the same opinion. Two points have been relied upon. First, it is said that this was a voluntary payment, and therefore cannot be recovered back, the plaintiffs having had the option of taking the goods at the bill of lading weight or of having them weighed over the ship's side. They were not bound to incur that expense. It therefore seems to me that the payment was not a voluntary one. The owners were attempting to place the plaintiffs in a wrong position. The second point resolves

(1) 4 B. & Ad. 375; 1 N. & M. 594.
(2) 2 N. & M. 608.
(3) 7 C. B. 797.
(4) 19 C. B. (N.S.) 453; 34 L. J. (C.P.) 268. In Ex. Ch. ante, p. 363.
(5) 15 C. B. (N.S.) 27; 32 L. J. (C.P.) 270.

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itself into a mere dispute about evidence. It was hardly denied that Mackenzie was authorized to receive the freight.

Rule discharged.

Attorneys for plaintiffs: *Green & Allen.*
Attorney for defendant: *W. J. Pelham.*

May 30.

EVANS *v.* LOUIS.

Practice—Discovery under s. 50 *of the Common Law Procedure Act*, 1854, 17 & 18 *Vict. c.* 125—*Attorneys' Books—Affidavit.*

To entitle a party to discovery under the 50th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, he must shew by affidavit that his adversary is in possession of some one document to the production of which he is entitled.

The Court will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries relating to the matters complained of.

THIS was an action against the defendant for alleged negligence as attorney for the plaintiff in the investment of a sum of 240*l.* advanced by him for the plaintiff to one James Hughes and his wife in June, 1862. The defendant pleaded not guilty, and a traverse of the retainer. Interrogatories having been administered to the defendant, under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, as to whether he had received any and what moneys on account of the plaintiff, and as to whether he had in his possession or power any papers, &c., belonging to the plaintiff, the answers to which were unsatisfactory, application was made to Keating, J., at chambers, for an order for discovery, under s. 50. The affidavit upon which that application was founded was in substance as follows:—

"I believe that, in the course of the negotiations for such investment, and in consequence thereof, the defendant wrote and sent to Hughes and his wife, or one of them, letters in relation thereto, of which I believe he kept copies:

"I believe that, after the completion of the said loan, the defendant wrote and sent to one Gabriel Roberts a letter or written

memorandum in relation thereto, of which the defendant has a copy or draft:

"I believe the defendant entered in some of his books, or otherwise made memoranda and entries relating to the said investment, such as are usual to be made by solicitors in the management of the affairs of their clients:

"I believe that the defendant was paid by the said James Hughes and wife, or one of them, for his services in the matter of the said investment, and that he entered the sum of money so received in his cash-book; but, whether the defendant made out any bill of costs, or whether he was paid a sum of money in gross, without having made out such bill of costs, I do not know:

"I am informed, and believe, that, in or about the month of August, 1863, or shortly afterwards, part of the property upon the security of which the defendant advanced my money was sold by him or by his orders, under an execution executed on the said goods in consequence of the defendant's neglecting to register my mortgage, or otherwise; and that the defendant has in his possession the process under which such sale was held, and other documents relating thereto; and that he has made entries or memoranda in his books or papers relating to the sale and the proceeds thereof:

"I am advised, and believe, that it is material and necessary for me, in order to support my claim on the trial of this cause, and to prepare for the trial thereof, to have such letters, copies of letters, books, memoranda, and entries, and the bill of costs, if any, produced to me, and that I shall derive material advantage and support from the production of the same:

"I am advised, and believe, that I am entitled to the production of the said letters and copies of letters, books, memoranda, and entries, and bill of costs, respectively, for the purpose of discovery and establishing my claim in this action: and I believe the said letters, copies of letters, books, memoranda, and entries, and bill of costs, are in the possession or power of the defendant."

The learned judge declining to make an order,

M'Intyre moved by way of appeal against his decision. The plaintiff could do no more than pledge his belief that the defendant

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had made entries in his books relating to the business in question; and, if any such entries exist, he is clearly entitled to inspect them, as he would have been under the old practice.

ERLE, C.J. To found an application under this section, the party must shew by affidavit that there is some one document in the possession or power of his adversary to the inspection of which he is entitled. I think the learned judge's discretion has been properly exercised.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule refused. (1)

Attorneys for plaintiff: *Rooks, Kenrick, & Crook.*

June 5.

LEES *v.* NEWTON.

Bankrupt—Protection from Arrest—Discharge under s. 113 *of the Bankrupt Law Consolidation Act,* 1849, 12 & 13 *Vict. c.* 106—*Attachment for non-payment of Money under Order of the Court of Chancery.*

An attachment for non-payment of money under an order of the Court of Chancery is an attachment for non-payment of a *debt* within the meaning of the 113th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

Where, therefore, the officer who had, under such process, arrested the plaintiff, who had been adjudicated bankrupt and had obtained his protection, refused, on such protection being shewn to him, to discharge the plaintiff, but detained him in his custody for a longer time than was necessary for obtaining a copy of the protection, and on the same day conveyed him to gaol, where the plaintiff was kept until an order of the Master of the Rolls was obtained for his discharge:—

Held, that the officer was liable for the penalty of 5*l.* for *one day*, but not for the subsequent detention of the bankrupt by the gaoler, over whom the officer had no control.

It is not necessary that the bankrupt should, at the time of shewing his protection, give the officer a copy thereof.

THIS was an action brought for the recovery of penalties under the 113th section of the Bankrupt Law Consolidation Act, 1849, at the rate of 5*l.* per day during the time the plaintiff was detained in custody under the circumstances set out in the following case, which was stated for the opinion of the Court, without pleadings, pursuant to the Common Law Procedure Act, 1852:—

(1) See *Cox* v. *Bockett*, 18 C. B. (N.S.) 241.

1. On the 14th of May, 1857, one Henry Lees filed a bill in Chancery against the plaintiff and certain other persons, and thereby prayed, amongst other things, that the plaintiff, who was the executor and trustee of one Robert Lees, deceased, might be ordered to account to and pay over to the said Henry Lees certain large sums of money, therein alleged to have been unaccounted for by the plaintiff as such executor and trustee.

2. On the 16th of February, 1865, an order was made in the said cause by the Master of the Rolls, by which it was ordered, amongst other things, that the plaintiff should, on or before the 26th of April, 1865, pay into the Bank of England, with the privity of the Accountant-General of the High Court of Chancery, to the credit of the before-mentioned cause of *Lees* v. *Lees and Others*, the sum of 31,110*l.* 0*s.* 8*d.*, and interest on 25,212*l.* 10*s.* 7*d.*, part thereof, at the rate of 5 per cent. per annum from the 25th of September, 1859, and on 5897*l.* 10*s.* 1*d.*, the residue of the first-mentioned sum, at the rate of 4 per cent. per annum from the 3rd of December, 1864, until the day of payment into court, less income-tax on such interest.

3. The plaintiff was unable to pay, and did not pay, the sum of money so ordered to be paid as aforesaid.

4. On the 27th of April, 1865, the plaintiff was duly adjudicated bankrupt in the Court of Bankruptcy at Manchester, on a creditor's petition, and on the same day obtained an order of protection, protecting him until the 18th of May then next.

5. On the 1st of May, 1865, an attachment was issued out of the High Court of Chancery against the plaintiff for breach of the order made the 16th of February, 1865.

6. On the 2nd of May, 1865, the sheriff of Lancashire, for levying execution of the said attachment, duly made his warrant thereon directed to the defendant, as and then being the bailiff and officer of the said sheriff, and delivered the same to the defendant, as and then being such bailiff and officer as aforesaid, to be executed by him.

7. On the 3rd of May, 1865, the defendant arrested the plaintiff by virtue of the warrant, and the plaintiff thereupon produced his protection to the defendant, and demanded to be discharged; but the defendant would not discharge the plaintiff from

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the arrest, but kept him in custody longer than was necessary for obtaining a copy of such protection, and until the defendant on the same 3rd of May, 1865, took the plaintiff in custody to, and delivered him to the gaoler of, Lancaster Castle, the same being the prison of the sheriff of Lancashire; and the plaintiff thenceforth remained and was in the custody there of the said gaoler until he was discharged as hereinafter mentioned. On the following day (4th of May) the defendant was served with the following notice, together with a copy of the plaintiff's protection order above set out annexed thereto, by Messrs. Sale & Co., as attorneys for the plaintiff:—

"As attorneys for and on behalf of Samuel Lees, who has been illegally arrested by you under a warrant from the sheriff of Lancashire, we do hereby give you notice that the said Samuel Lees was on the 27th of April last duly adjudicated bankrupt in her Majesty's Court of Bankruptcy for the Manchester district, and protection from process was then granted to him, and which protection was duly produced and shewn to you when making such arrest. And we further give you notice, and require you forthwith to release and discharge the said Samuel Lees; and, in default thereof, and so long as you shall continue to illegally detain him, we shall require from you the sum of 5*l.* daily and every day, being the penalty provided by the Bankrupt Law Consolidation Act, 1849. Dated, &c.

"To the sheriff of Lancashire, Mr. Martin Newton, his officer, and all others whom it may concern."

On the same 4th of May, the plaintiff shewed his protection to the gaoler, and demanded to be discharged; but the gaoler would not discharge the plaintiff.

8. On the 13th of May, 1865, the plaintiff made an application to the Court of Bankruptcy at Manchester for his discharge from custody. This application was opposed on behalf of Henry Lees, the plaintiff in the cause of *Lees* v. *Lees and Others;* and the commissioner refused to discharge the plaintiff, on the ground that, the plaintiff being in custody under an attachment out of Chancery, the gaoler would not be justified in releasing him.

9. On the 2nd of June, 1865, the plaintiff, having been brought before the commissioner, passed his last examination, and an order

of discharge under his bankruptcy was granted to him; and an application was then made to the commissioner for the discharge of the plaintiff from such custody. The commissioner refused to discharge the plaintiff, on the same ground as before by him stated.

10. On the 6th of June, 1865, a motion was made before the Master of the Rolls for the discharge of the plaintiff from such custody; and his Honour, after hearing counsel on both sides, ordered that the plaintiff should be discharged out of the custody of the sheriff of Lancashire as to his contempt for non-payment of the said sums of money; and the plaintiff in pursuance of such order was thereupon discharged on the 8th of June, 1865, having been in custody as aforesaid on and since the 3rd of May.

The questions for the opinion of the Court were, whether, under the circumstances aforesaid, such a detention of the plaintiff took place as that the defendant has forfeited to the plaintiff for his own use, under and according to the statute 12 & 13 Vict. c. 106, s. 113, the sum of 5*l.* for the said 3rd of May, and the like sum for every or any and how many of the subsequent days up to and inclusive of the said 8th of June.

Field, Q.C. (*Holker* with him), for the plaintiff. The question turns upon the construction to be put upon the 113th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts that, "if any bankrupt shall be arrested for *debt*, or on any escape warrant, in coming to surrender, or shall after his surrender and while protected by order of the court be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and, if any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l.* for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit." It will be urged on the part of the defendant, that the bankrupt here was not arrested for a *debt*, that the arrest was not made upon mesne pro-

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cess, and that the officer could not be liable beyond a single penalty, inasmuch as he took the bankrupt to Lancaster Castle on the same day, or at all events not beyond the 13th of May, when the commissioner refused to discharge the bankrupt. It is submitted, however, that the defendant is liable for the whole period of the plaintiff's detention. The 112th section shews that the object of the legislature was that the bankrupt should be freed from all pressure, so as to enable him to give all the assistance in his power to the assignees in getting in his estate. An attachment for non-payment of money is in the nature of civil process to enforce the payment of a debt; and persons in custody under attachments for disobedience of an order of court for payment of a sum of money are in custody for a civil debt, and are subject to, and entitled to the advantage of, the bankrupt laws: per Lord Tenterden in *Rex* v. *Edwards*. (1) That was decided upon the 117th section of the 6 Geo. 4, c. 16, the words of which are identical with those of the 12 & 13 Vict. c. 106, s. 113. So, in *Ex parte Parker* (2), it was held that the privilege of a bankrupt from arrest during his examination extends to an attachment for not paying money under an award made a rule of court; and in *Ex parte Bury* (3), to an attachment for a contempt in not paying money into court in pursuance of an order of the Insolvent Debtors Court. The like was held in *Re M'Williams* (4), upon a decree of the Court of Chancery in Ireland directing the party to lodge a sum of money in court. Under s. 112, the supreme authority may refuse to discharge the party if he has been guilty of fraud or breach of trust, &c. Then, for what length of detention is the defendant responsible? Inasmuch as the gaoler would have no authority to discharge the plaintiff, it is submitted that the defendant is liable in respect of the whole period of his detention in prison. This is not like the case of a remand by a competent authority, as in *Lock* v. *Ashton*. (5)

C. Hutton, for the defendant. This, no doubt, was in some sense a debt; but not a debt such as was contemplated by the 113th section of the 12 & 13 Vict. c. 106. It does not follow that the

(1) 9 B. & C. 652, 654.
(2) 3 Ves. 554.
(3) 7 Jurist, 406.
(4) 1 Sch. & Lef. 169.
(5) 12 Q. B. 871; 18 L. J. (Q.B.) 76.

officer is liable because the bankrupt is entitled to his discharge. The provision in question was first introduced into the 5 Geo. 2, c. 30, s. 5, and is repeated in almost the same words in the 6 Geo. 4, c. 16, s. 117. At that time the words were applicable to arrest on mesne process only, under which the officer usually took bail, and so became the detaining officer, being only bound to produce the defendant at the return-day of the writ. When the language of the two sections is compared, it is manifest that "debt" in s. 113 is not to be taken to be co-extensive with "debt" in s. 112. One of the strongest cases on the subject is that of *Ex parte Russell* (1), where a bankrupt attending commissioners for examination, in obedience to their summons, having been arrested under an extent at the suit of the Crown, was held to be entitled to his discharge, on the principle of the common law protecting witnesses, notwithstanding the Crown is not bound by the bankrupt laws. The same principle was acted upon in *Ex parte Jackson.* (2) A protection under s. 112 was held, in *Phillips* v. *Poland* (3), to be available only against creditors who are such at the date of the bankruptcy. How could the officer in such a case as that tell whether he ought to arrest the party or not? Here, the money might have been misappropriated by the bankrupt, and not provable as a debt under the fiat.

[ERLE, C.J. Does "debt" mean a debt provable under the fiat?]

The whole scope of the act is to deal with debts only which are provable. Then, it appears from the case that a copy of the order of protection was not given to the officer until the day after the bankrupt's arrest, when he was beyond the officer's control. Until that condition was complied with, the bankrupt was not entitled to be discharged.

Field, Q.C., in reply. It has never yet been contended that the word "debt" is confined to a demand which is provable; and at all events every debt must be assumed to be provable unless the contrary is shewn. In *re M'Williams* (4), the Lord Chancellor of Ireland (Lord Redesdale) says: "The object of the act of parliament (5) is, that a party bankrupt shall not be liable to any

(1) 1 Rose, 278. (2) 15 Ves. 116. (3) Ante, p. 204.
(4) 1 Sch. & Lef. at p. 174. (5) 11 & 12 Geo. 3, c. 8, s. 28.

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arrest by a creditor in coming to surrender and during his examination, that creditors shall not be at liberty to interrupt the proceedings under the commission, and that the bankrupt shall be forthcoming to be examined. It is held out to him as a protection during that examination which is to produce a disclosure of all his effects, and which is a proceeding in the nature of an execution in favour of all creditors at the time of the act of bankruptcy committed who come in to take the benefit of it. This protection must be intended to be given him against a demand sued for in equity as well as at law, or else the purpose of the statute would be defeated. Every mode by which a creditor can arrest a bankrupt for a debt comes within the meaning and general words of the act. That the process resorted to is a process of contempt, signifies nothing. There are many cases in which the process of other courts, importing to be process of contempt, is considered as civil process for various purposes."

[ERLE, C.J. Does not the section mean that the party shall be discharged on producing his protection, and giving the officer a copy?]

The penalty is imposed for detaining the bankrupt "after he shall have shewn such protection."

ERLE, C.J. I am of opinion that the plaintiff is entitled to recover the penalty for one day's detention. I cannot help thinking that the legislature has imposed an extreme risk upon the officer who is doing a public duty. By the warrant issued upon the attachment in this case, the officer was commanded to arrest the plaintiff for a very large sum of money. But, inasmuch as the courts have uniformly declared that an attachment for non-payment of a sum of money under an order of the Court of Chancery is an attachment for non-payment of a debt within the 112th section of the Bankrupt Law Consolidation Act, 1849, and we cannot consistently hold that the words of the 113th section are to receive a different construction, I come reluctantly to the conclusion that the officer is liable for the one day during which he detained the plaintiff after having been shewn the protection. When he had handed the plaintiff over to the gaoler, however, he was free from further liability.

WILLES, J. I am of the same opinion. Every one must wish that the officer, who was acting honestly in pursuance of his duty, could be relieved from liability, when the tribunal before whom the plaintiff was first brought took the same view of the statute as the officer had done. It appears, however, that the opinion of the commissioner was erroneous, because, looking at the law as laid down in the case of *In re Williams* (1), it is impossible to hold that the words "arrested for debt," in the 113th section of the statute, do not include an arrest under process of contempt for disobedience of an order to pay money into court. That was the decision come to by Lord Redesdale after very great consideration. It was in accordance with a previous decision in *Ex parte Parker* (2), and has since been acted upon. Undoubtedly a great burthen is imposed upon the officer if he is to be called upon to decide upon the effect of the order of protection. But, looking at the words of s. 113, I am obliged to hold that he is. The words are, "If any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit," &c. It occurred to me at one time that the officer would be discharged from liability here because a copy of the order of protection was not given to him until the plaintiff was out of his custody. But, on reflection, I think we cannot import the first part of the section into the last part. I cannot say that the latter part of the section means producing the protection and giving a copy. If the party arrested produces his protection and gives the officer a copy, he is to be immediately discharged; but, if the protection is shewn to the officer, and no copy is given, he is only entitled to detain the bankrupt for so long time as may be required to enable him to obtain a copy. It is stated in the case that the defendant, on being shewn the protection, "would not discharge the plaintiff from the arrest, but kept him in custody longer than was necessary for obtaining a copy of such protection." I should have been glad to be able to hold that no penalty was recoverable unless the party was detained for an entire day. But, looking at the words of the act, and at the authorities to which we have been referred, I feel bound to come to the conclusion that 5*l.* is to be paid for every

(1) 1 Sch. & Lef. 169. (2) 3 Ves. 554.

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day or part of a day the bankrupt is detained improperly. Then, is the defendant liable to a penalty of 5*l.* for every day's detention of the bankrupt until it was decided by the Master of the Rolls that he was entitled to be discharged? I am clearly of opinion that the penalty is recoverable only for the first day; because, though the defendant was wrong in taking the plaintiff to gaol, when he had taken him there he placed him beyond his control, and the subsequent detention was not an act for which he can be held liable.

MONTAGUE SMITH, J. I am of the same opinion. I think we are bound by the authorities as to the proper construction of the statute. It has been decided that an attachment for non-payment of money pursuant to an order of the Court of Chancery is a final execution for a *debt*, and that the taking under such attachment is a taking for a *debt* within the meaning of similar words in the earlier Bankrupt Acts. And it is to be observed that these are not merely decisions of the Court of Bankruptcy or the courts of equity; but the principle has been acted upon in the Court of Queen's Bench in *Rex* v. *Edwards* (1), where Lord Tenterden adopts the rule laid down by Lord Redesdale in the case of *In re M'Williams*. (2) I also agree with my Lord and my Brother Willes that one penalty only is recoverable. When the plaintiff was in the custody of the governor of Lancaster Castle, his detention ceased to be the act of the defendant. The officer is responsible for his own acts and defaults only.

Judgment for the plaintiff for 5l. (3)

Attorneys for plaintiff: *Langford & Marsden.*
Attorneys for defendant: *Chester & Urquhart.*

(1) 9 B. & C. 652.
(2) 1 Sch. & Lef. 169.
(3) A bankrupt was discharged from custody upon an attachment out of the Divorce Court for non-payment of alimony. *Re Rawlins*, 12 L.T. (N.S.) 57.

KELLY *v.* MORRAY.

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June 7.

Evidence—Bankruptcy—Appointment of Creditors' Assignee under ss. 116, 123, *of the Bankruptcy Act*, 1861, 24 & 25 *Vict. c.* 134—*Sealing—Record of the Court of Bankruptcy.*

A certificate of the choice and appointment of a creditors' assignee, dated before action, and sealed with the seal of the Court of Bankruptcy, is conclusive evidence, in an action by the assignee so appointed, of his title to sue, even though it appears that the signature of the commissioner was not affixed to the document until after the commencement of the action,—the certificate of appointment being a *record* of the court.

THIS was an action by the plaintiff, creditors' assignee of one Thomason, a bankrupt, to recover the value of certain stock in trade and furniture of Thomason which had been seized by the defendant under a bill of sale executed by Thomason on the 27th of November last.

The defendant pleaded not guilty, a traverse of the appointment of the plaintiff as creditors' assignee, and not possessed.

The cause was tried before Bramwell, B., at the last Chester spring assizes, when the following facts appeared in evidence:—On the 8th of December, 1865, a trader debtor summons issued against Thomason, returnable on the 13th. On the 9th the defendant sold Thomason's goods under the bill of sale. Thomason did not appear at the return of the summons; and on the 15th he was adjudged a bankrupt. At the first meeting, viz. on the 6th of January, 1866, the plaintiff was chosen creditors' assignee. A certificate of the plaintiff's appointment as assignee, sealed with the seal of the District Court of Bankruptcy, and signed by the registrar, and bearing date the 9th of January, 1866, was put in, certifying that the plaintiff was duly chosen assignee on the 6th of January, and that his appointment was ratified by the commissioner. The order was verbally pronounced on the 6th of January, and drawn up on the 9th; but it was not *signed* by *the commissioner* until after the commission day of the assizes.

This action was commenced on the 13th of February, 1866.

Upon this state of facts, it was contended on the part of the defendant, that, by force of the 116th, 117th, and 123rd sections

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of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, the property in the goods in question was not vested in the plaintiff at the time of the commencement of the action.

The learned judge reserved the point, and a verdict was found for the plaintiff, damages 200*l.*

M'Intyre, in Easter Term last, obtained a rule nisi to enter a nonsuit, on the ground that the plaintiff was not duly appointed assignee at the time the action was commenced. He referred to the 116th, 117th, and 123rd sections of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, and to the case of *Ex parte Nash, In re Wyatt.* (1)

H. Giffard, Q.C., and *Horatio Lloyd*, shewed cause. The question turns upon the construction of the 123rd section of the Bankruptcy Act, 1861, which enacts, that, "when the election of an assignee shall have been accepted by the person elected, and confirmed by the Court, the Court shall, by certificate under the hand of the commissioner and the seal of the Court (to be called the certificate of appointment), declare such creditors' assignee to have been duly elected, and appoint him to the said office accordingly." The assignee is chosen by the creditors (under s. 116), subject to rejection by the Court. And by s. 117, "upon the appointment of the creditors' assignee, all the estate, both real and personal, of the bankrupt, shall be divested out of the official assignee, and vested in the creditors' assignee." The question is, when does the appointment take place,—at the time of the choice, or at the time of the confirmation of it by the Court? It is submitted that it relates back to the time of the choice. An executor need not have obtained probate at the time he brings an action. It is sufficient if he has done so before the day of trial.

[BYLES, J. When profert was required, the executor must have obtained probate before declaring; but now it is sufficient if he be armed with it at the time of trial. A conviction of justices is never formally drawn up at the time it is pronounced.

WILLES, J. Why did not the Court of Bankruptcy here act upon the authority given to it by the 1st section of the act, which

(1) 1 Deac. & Ch. 445.

provides that "the Court of Bankruptcy shall have and exercise for the purposes of this act all the powers and authorities of the superior courts of law and equity"? The appointment is a record of the court (1), and may be drawn up formally whenever it is required. The intention of the legislature was that the Court of Bankruptcy should have all the functions of a superior court of record.]

A somewhat similar question arose upon the 12th section of the 12 & 13 Vict. c. 106, which gave an appeal to the Court of Chancery, in *Ex parte The Dudley and West Bromwich Banking Company* (2), where it was held by Lord Westbury, C., that the date of an order is the day when it was made, and the time for appealing runs from that day, and not from the day when the order was drawn up. It may be doubted whether the signature of the commissioner was essential to the validity of the appointment: *Morgan* v. *Parry*. (3) In *Ex parte Nash* (4) the appointment was assumed to date from the choice of the creditors.

M'Intyre, in support of the rule. The words of s. 123 are plain: the choice of the creditors' assignee is the act of the creditors, but the appointment is the act of the commissioner; and nothing vests in the assignee until his appointment. It is manifest that the mere choice by the creditors does not make the party assignee. He may be rejected by the commissioner: and the approval of the commissioner can only be signified by writing under his hand and the seal of the court. Until then, *Ex parte Nash* (4) shews that the appointment is not complete. The case of a conviction is altogether inapplicable: the *conviction* is the decision of the justices at the time. But here the signature and seal constitute the appointment.

[BYLES, J. The 203rd section, which makes the document appearing to be sealed with the seal of the court evidence without further proof, reflects back light upon the meaning of the 123rd section. If upon the face of it the document is good, we cannot go behind it to inquire when the seal was affixed to it.]

(1) 12 & 13 Vict. c. 106, s. 236; 25 & 26 Vict. c. 134, s. 203; and by s. 206 of the latter act, a copy of any proceeding sealed with the seal of the court is to be sufficient evidence that such proceedings have taken place.

(2) 32 L. J. (Bkptcy.) 68.

(3) 17 C. B. 334; 25 L. J. (C.P.) 141.

(4) 1 Deac. & Ch. 445.

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The seal mentioned in s. 203 is a seal affixed to the document for the purpose of making it evidence, not the seal mentioned in s. 123.

[ERLE, C.J. The document is not to have *two* seals.]

ERLE, C.J. I am of opinion that this rule should be discharged. The plaintiff was duly chosen assignee, and the choice approved, and the appointment drawn up and sealed with the seal of the court: but it is objected it was not signed by the commissioner until after the commencement of the action. Without going into any detail, I am of opinion that the seal of the court made the instrument a record which was admissible in evidence under the 203rd section of the Bankruptcy Act, 1861; and we have no right to inquire when the signature was attached to it. It was enough that it was signed and sealed at the time it was tendered in evidence.

WILLES, J. I am of the same opinion. The proper conclusion upon the facts appears to me to be that the appointment and the seal were made and affixed at the proper time, and the signature of the commissioner put to it afterwards. The 123rd section seems to draw a distinction between the act of the commissioner and the act of the court: the court is, "by certificate under the hand of the commissioner and the seal of the court," to "declare such creditors' assignee to have been duly elected," and to "appoint him to the said office accordingly." The act of the court is that which is material. Apart from the 203rd section, I should have been inclined to hold this sufficient proof of the appointment: it is very like the case of a certificate of conformity or of discharge, which relates back to the time when the order was pronounced. The 203rd section, however, deals with the seal as the material thing to be looked to. The document produced was a record binding upon the court under s. 203. The more so as by s. 1 the Court of Bankruptcy is to have and exercise for the purposes of the act all the powers and authorities of the superior courts of law and equity,—one of which is that they may draw up their records at any time they may be required.

BYLES, J. I, at first, thought it might have been a question whether the appointment of the plaintiff as assignee was not bad

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on the ground that it purported to be drawn up on the 9th of January, and, instead of saying that the plaintiff "was on this day chosen," &c., the expression is, "was on the 6th day of January instant chosen," &c. But, if not a valid appointment of the 6th, it would at all events be an appointment of the 9th. However, the 203rd section makes it a record of the Court of Bankruptcy; and, if there be anything wrong, an application might have been made to that court to rectify it: we must treat it as a record. It bears upon the face of it all the requisites of a statutory appointment, viz. the signature of the commissioner and the seal of the court.

MONTAGUE SMITH, J., concurred.

Rule discharged.

Attorneys for plaintiff: *W. & H. P. Sharp.*
Attorney for defendant: *E. Doyle.*

June 7.

IN THE MATTER OF AN ARBITRATION BETWEEN T. P. WILLCOX AND J. STORKEY.

Arbitration—Agreement to refer—Making Submission a Rule of Court under s. 17 *of the Common Law Procedure Act*, 1854, 17 & 18 *Vict. c.* 125.

By an agreement under seal for the transfer of a business, it was stipulated that, "in case any dispute should arise between the parties thereto concerning any matter relating to the business, or those presents or the construction thereof, such disputes should be referred to such member of the firm of B. & Co. as should be appointed by that firm to undertake the reference, in accordance with and subject to the provisions of the Common Law Procedure Act, 1854." Disputes having arisen, B. & Co. appointed one T., a member of their firm, to be arbitrator, and he duly made his award:—

Held, that there was a sufficient submission in writing to be made a rule of court under s. 17 of the Common Law Procedure Act, 1854.

BY an agreement, under seal, between Thomas Percival Willcox, of the city of Bristol, architect, surveyor, and builder, of the one part, and Joseph Storkey, of the same place, mason and builder, of the other part, after reciting that Willcox had for several years carried on the business of an architect, surveyor, and builder in the said city, and that Storkey had been his foreman, it was agreed that Willcox should relinquish in favour of Storkey the business

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of a builder, retaining and carrying on only the business of an architect and surveyor, upon certain terms: and it was, amongst other things, provided that, "in case any dispute should arise between the parties thereto, or their respective executors, &c., or either of the said parties and the executors, &c., of the other of them, concerning any matter in any way relating to the said business so carried on by Storkey, or the accounts thereof, or those presents or the construction thereof, such dispute shall be referred to such one of the members of the firm of Barnard, Thomas, & Co., of the city of Bristol, accountants, as shall be appointed by that firm to undertake the said reference, in accordance with and subject to the provisions of the Common Law Procedure Act, 1854." Disputes having arisen between the parties, Barnard, Thomas, & Co. appointed one Tribe, a member of their firm, to be the arbitrator, and that gentleman made an award in favour of Mr. Willcox.

The above agreement for reference having been made a rule of court (1),

J. O. Griffits, on behalf of Storkey, moved to set aside that rule, on the ground that there was no submission *in writing* within the 17th section of the Common Law Procedure Act, 1854. In *Ex parte Glaysher* (2) it was held, that, where parties to a deed covenant to refer disputes which may arise to arbitrators to be chosen by them, and, on disputes arising, appoint arbitrators, the submission is by parol, and therefore cannot be made a rule of court under that section. In that case, Pollock, C.B., points out the distinction between an agreement to refer to an arbitrator to be appointed, and an agreement to refer to a person named in the instrument itself. "There is," says his Lordship, "an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agree-

(1) Under the 17th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which provides that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contains words purporting that the parties intended that it should not be made a rule of court."

(2) 3 H. & C. 442; 34 L. J. (Ex.) 41.

ment to refer to an arbitrator *named* a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more parties to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed; and a parol submission cannot be made a rule of court."

[ERLE, C.J. *Re Newton and Hetherington* (1) seems to be an authority the other way. There, a lease contained a proviso, that in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both; and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of court." Disputes having arisen, the lessor appointed an arbitrator, in writing, and gave notice in writing to the lessee that he had done so; but the latter did not appoint an arbitrator on his part; whereupon, after due notice, the arbitrator appointed by the lessor proceeded ex parte, and made an award: and we held, that, upon filing the appointment, with an affidavit of the lessor verifying his signature thereto, the submission might be made a rule of court. I see no substantial distinction between that case and this.

WILLES, J. The 12th and 13th sections of the act, which deal with cases in which no arbitrator is appointed, use terms corresponding with those of s. 17.]

There is here no agreement *in writing* to refer. It is difficult to discover any difference between *Ex parte Glaysher* (2) and this case.

ERLE, C.J. The language of the statute, the decision of this Court, and the expediency of the thing, are all opposed to this application. *Re Newton and Hetherington* (1) is substantially the same as this case. The agreement is, that, in case any dispute

(1) 19 C. B. (N.S.) 342.

(2) 3 H. & C. 442; 34 L. J. (Ex.) 41.

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should arise between the parties concerning any matter in any way relating to the subject-matter or the construction of the agreement, such dispute should be referred to such member of the firm of Barnard & Co. as should be appointed by that firm to undertake the reference. The firm in writing appointed Mr. Tribe, and he has made his award. I think there is enough in writing to be put upon the files of the court. It is not necessary that we should conflict with the decision of the Court of Exchequer in *Ex parte Glaysher*. (1) I will only add that the 12th and 17th sections of the Common Law Procedure Act, 1854, shew a clear intention that parties who have agreed that their differences shall be settled by arbitration shall be compelled to abide by their engagements.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorney for Storkey: *A. Kerly.*

June 9.

TOTTERDELL *v.* THE FAREHAM BLUE BRICK AND TILE COMPANY, LIMITED.

Company—Authority of Directors—Executed contract—25 & 26 *Vict. c.* 89.

A company was incorporated under 25 & 26 Vict. c. 89; the memorandum of association being signed by seven shareholders; no deed of association was filed and no other shares allotted; A. entered into an agreement to act as foreman of the "company's" works, which was signed by B. and C., two of the persons signing the memorandum of association, as "chairman" and "managing director," respectively. In an action by A. against the company for work done under the agreement:—

Held, that in the absence of evidence to the contrary, the jury were justified in presuming that B. and C. had authority to bind the company.

THIS was an action for work done and materials provided. The defendants pleaded the general issue. The case was tried before Byles, J., at the first sitting at Westminster, in Trinity Term. It appeared that Messrs. J. Brace and T. T. Ponsonby, having a lease of some land near Fareham, containing blue clay, promoted a company (the defendants in this action) for the purpose of making bricks. The company was incorporated on the 27th of November, 1865, under the Companies Act, 1862 (25 & 26 Vict. c. 89), by

(1) 3 H. & C. 442; 34 L. J. (Ex.) 41.

the filing of a memorandum of association for the purpose of making and selling bricks, &c., and to employ the necessary workmen, servants, &c., but no articles of association were filed; and except those of the seven persons who signed the memorandum of association no shares were allotted. On the 29th of November, 1865, Messrs. Brace and Ponsonby entered into an agreement with the plaintiff in the following terms:

"Agreement made this 29th of November, 1865, between the undersigned, Joseph Brace and Thomas Thompson Ponsonby, and the undersigned, Charles Totterdell, whereby, for the considerations hereinafter named, it is agreed that the said Charles Totterdell shall be employed as foreman to the Fareham Blue Brick and Tile Company, Limited, at a salary of 3*l.* per week, a house on the works rent free, or an allowance in lieu thereof of 10*l.* per annum, and coal not exceeding six tons per annum; salary to commence December 16th, 1865. This agreement is entered into, provided the said Charles Totterdell manufactures blue bricks from the company's clay at Fareham equal in quality to those made by him at Bishop's Waltham, samples of which are now at the stations on the London and South Western Railway. Provided Charles Totterdell carries out the manufacture as above described, six months' notice is to be given and accepted on either side as cancelling this agreement, but in the event of Charles Totterdell failing to carry out the manufacture as described above, then and in such case, one month's notice from the company shall be held to cancel and void this agreement."

This agreement was signed by Brace as managing director, and Ponsonby as chairman of the company. Messrs. Brace and Ponsonby entered into a provisional agreement with the company for the lease to the company of the land near Fareham, and the plaintiff entered on the land and dug some clay, and continued to act as foreman to the company till the commencement of the action. On March 9th, he received from Messrs. Brace and Ponsonby 39*l.* for wages, and gave the following receipt:

"March 9, 1866.

Received from Mr. J. Brace thirty-nine pounds for wages due from December 16, 1865, to March 10, 1866. 39*l.*

(Signed) Charles Totterdell."

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There was no evidence of the plaintiff having had any communication with any other member of the company than Messrs. Brace and Ponsonby. No evidence was called for the defendants, and a verdict was entered for the plaintiff for 18*l.*, with leave to the defendants to move to enter a nonsuit on the ground that there was no evidence to go to the jury of any contract with the defendants.

Pope moved for a rule nisi, pursuant to the leave reserved. There is no evidence that Messrs. Brace and Ponsonby were ever authorized by the company to enter into this agreement, and it rests with the plaintiff to shew that they were; otherwise they could not bind the company. There is no evidence that any other person who was interested in the company ever knew of the plaintiff being employed, and the land on which he worked, though intended to be taken by the company, was not proved to have been actually in their possession. The defendants cannot, therefore, be said to have ratified the agreement. The receipt given by the plaintiff for the wages he has received was not made out to the company, and all the evidence shews that the agreement was really with Messrs. Brace and Ponsonby, and that the plaintiff has, in fact, brought the action against the wrong party.

WILLES, J. I am of opinion that no rule should be granted. This was an action against a company incorporated under 25 & 26 Vict. c. 89, by the filing of a memorandum of association, for work done for them, the work being within the scope of the operations of the company. The company either possessed at the time when the memorandum of association was filed, or else soon after acquired, the land on which their operations were to be carried out, and Messrs. Brace and Ponsonby, professing to act on behalf of the company, engaged the plaintiff as foreman. The plaintiff under this agreement, which was on the face of it with the company, did the work for which the action is brought. It is true that when he was paid for his previous work he gave a receipt to Mr. Brace, who paid him, but it is evident he considered that Mr. Brace was acting for the company. The question is, whether the plaintiff has made out any case against the defendants. As the defendants called no witnesses, it is sufficient if

there was any evidence on which the jury could rightly find their verdict. The question whether the company were bound depends on the powers of directors. By section 3 of the act (1) the persons signing the memorandum of association are to be directors till others are appointed, and as no deed of association was filed, their powers were regulated by the rules given in schedule A of the act. By clause 66 of that schedule the directors can fix the number who shall be a quorum, and they might therefore, fix the number at two, and by clause 68 they can delegate their powers to committees of their own body. It is clear, therefore that the two directors might have had authority to make the agreement. There is, then, the fact that they ostensibly had, and dealt with the plaintiff as if they had such authority. The effect of this was much considered in the case, *The Royal British Bank* v. *Turquand*. (2) There the directors represented that a vote had been passed at a meeting of the shareholders, which was necessary to give them the powers they professed to exercise. The Court gave judgment for the bank on the ground that the plaintiffs had a right to assume that the vote had been passed. No doubt there the agreement was under seal, and the defendants were therefore estopped from denying it, while in this case there is only a primâ facie presumption that the directors had the power they professed to exercise. As, however, no evidence was given to rebut that presumption, it is sufficient to support the verdict.

BYLES, J. I am of the same opinion. The company existed, and the directors existed, and under the powers conferred by clauses 66 and 68 of schedule A, of 25 & 26 Vict. c. 89, the two directors *may* have had power to enter into the agreement. The company at this time consisted of seven persons, and whether the company actually gave authority to Messrs. Brace and Ponsonby or not, if they did not interfere but allowed Brace and Ponsonby to act with an apparently larger authority than those gentlemen really possessed, it comes within the rule, that a principal is bound, not only by such acts of the agent as are within the scope of the agent's *actual* authority, but by such acts as are within the

(1) 25 & 26 Vict. c. 89.

(2) 5 E. & B. 248; 24 L. J. (Q.B.) 327. S. C. in error, 6 E. & B. 327; 25 L. J. (Q.B.) 317.

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larger margin of an apparent or *ostensible* authority derived from the representations, acts, or default of the principal.

MONTAGUE SMITH, J. I am of the same opinion. This agreement was within the scope of the company's powers, and two directors may have been able to enter into it, either as forming a quorum of the directors, or acting as a committee to whom they had delegated their authority. This being so, why should not the company be bound? It appears to me that the onus is on the company to shew that the two directors had not authority to make the contract. The *Royal British Bank* v. *Turquand* (1) was decided on that principle, and Jervis, C.J., there says: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement, but they are not bound to do more; and the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." It appears to me, too, that the work having been done on land which was substantially land of the company, there was evidence that it was known to the other members of the company, and therefore a presumption that it was ratified by them.

Rule refused.

Attorneys for defendants: *Matthew & Greetham.*

(1) 6 E. & B. 327; 25 L. J. (Q.B.) 317.

RANDEGGER *v.* HOLMES AND OTHERS.

June 11.

Contract—Arbitration Clause—Staying Proceedings under s. 11 *of the Common Law Procedure Act*, 1854, 17 & 18 *Vict. c.* 125.

To an application for a stay of proceedings under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, on the ground that the instrument upon which the action is brought contains a stipulation that, "if any difference should arise between the parties, either in principle or detail," the same shall be referred to arbitration,—it is no answer that the difference is one of law, as to the construction of the instrument.

BY a charterparty dated the 19th of October, 1865, the defendants let to the plaintiff a steam-vessel called the *Advance* for six calendar months at charterer's option, commencing on or about the 1st of November. The charterparty contained, amongst others, the following provisions:—"The freight for the hire of the said steamer shall be paid as follows: At and after the rate of 796*l.* sterling per calendar month, and payable bi-monthly in advance, in cash in London, less 2½ per cent. in lieu of address commission, until the vessel is again returned by the charterer, he having given fourteen clear days' notice to owners of his or their intention so to do. In the event of loss of time by deficiency of men, want of stores, break down of engines or machinery, or by the vessel's becoming incapable of steaming for more than twenty-four hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. *Should any difference arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration at London to two persons, one to be chosen by each contracting party, with power for them to call in a third, and the decision of a majority shall be final and binding.* The acts of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation, and machinery, of whatever nature and kind, mutually excepted. In the event of the steamer being lost, the money advanced upon the current month shall be returned, in proportion to the number of days which she may not have completed of that month. It is clearly understood by the contracting parties to this charter that, the freight being made payable in advance, the charterers will not come under further advances to the ship abroad; and that, in the

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event of the steamer putting into any port or place from damage or repairs to hull, spars, or machinery, or other cause pertaining to owners, the charterers shall not be responsible for any port-charges or pilotage; and the time so lost to charterer shall be deducted from freight."

The charterer paid the first fourteen days' hire in advance, in accordance with the charterparty; but, having received intelligence that the ship had met with a disaster at sea when on her voyage from Newcastle to Newport, and that she had put into Portland for repairs, he declined to make the second bi-monthly payment; whereupon the owners insisted that the charterparty was at an end, and employed the vessel for other purposes.

An action having been brought by the charterer against the ship-owners for a breach of the charterparty, and a cross-action by the ship-owners against the charterer for non-payment of freight,

Hannen, for the ship-owners, obtained a rule calling upon the charterer to shew cause why all further proceedings in his action should not be stayed, on the ground that he had by the charterparty agreed that all differences between them should be referred to arbitration.

Sir G. Honyman shewed cause. The question between the parties being simply one of law upon the construction of the charterparty, the case is not within the 11th section.

[WILLES, J. Is there any case, except where there has been a suggestion of fraud, in which the Court has refused to interfere?]

Wallis v. *Hirsch* (1) was a case where fraud was suggested. But, in *Lury* v. *Pearson* (2), where by a charterparty it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners, and the charterparty contained a stipulation that "any question or difficulty which might thereafter arise out of the charterparty should be decided by arbitration," in a manner pointed out,—an action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that

(1) 1 C. B. (N.S.) 316. (2) 1 C. B. (N.S.) 639.

there was no defence, the case was held not to be one for the application of this section.

Hannen, in support of the rule, was not called upon.

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WILLES, J. I see no reason why the stipulation which the parties have entered into should not be carried into effect. Both actions ought to be referred, the parties consenting that the costs of this application and of the application at Chambers should be in the discretion of the arbitrators.

ERLE, C.J., and BYLES and MONTAGUE SMITH, JJ., concurred.

Rule accordingly. (1)

Attorneys for plaintiff: *Thomas & Hollams.*

Attorneys for defendants: *Shum & Crossman.*

SELIGMANN *v.* LE BOUTILLIER.

June 11.

Contract—Arbitration Clause—Staying proceedings under s. 11 *of the Common Law Procedure Act*, 1854, 17 & 18 *Vict. c.* 125.

By charterparty between plaintiff (ship-owner) and defendant (charterer), it was agreed, that "should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to," &c. The owner having brought an action for freight, and the charterer having preferred a cross-claim for damages for the captain's refusal to ship a reasonable amount of cargo, and for general disobedience of orders, and being willing to refer all matters to arbitration :—

Held, that it was a case for the interference of the Court under the 11th section of the Common Law Procedure Act, 1854.

BY a charterparty the defendant agreed to hire the plaintiff's ship *Adele* for a term, at a lump freight per month; the charterparty containing a stipulation that, "should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to three persons at Liverpool, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or any two of them, shall be final; and, for the purpose of enforcing any award, this agreement may be made a rule of court."

Disputes having arisen between the parties in consequence of

(1) See the next case.

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the captain's refusal to take on board what the charterer considered to be a reasonable amount of cargo, and in other respects disregarding the orders and instructions of the charterer, for which the latter claimed damages, and the owner having brought an action to recover arrears of the stipulated hire of the ship,

Joyce, on a former day, after an ineffectual application at chambers, obtained a rule calling upon the plaintiff to shew cause why all further proceedings should not be stayed, and the matters referred to arbitrators, pursuant to the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

Crompton shewed cause. As the defendant has a cross-claim against the plaintiff, the case is taken out of the jurisdiction of the Court; or, at all events, it is a case in which the Court will not exercise their discretion, if they have any. *Russell* v. *Pellegrini* (1) will be relied on in support of the rule; but, in *Daunt* v. *Lazard* (2), Bramwell, B., expressed his dissent from that decision, and doubted whether the Court of Exchequer would, notwithstanding that case, allow a reference of a matter not available as a defence or in reduction of damages in the same action, but only a ground for a cross-claim in another action. In *Pennell* v. *Walker* (3), F. and S. having brought an action against W. to recover the price of timber delivered under a contract, and W. having brought a cross-action in which he sought to recover damages against F. and S. for alleged breaches by them of the same contract, the two actions, and all matters in difference between the parties, were referred to arbitration. Before anything was done under the reference, F. and S. became bankrupts; and their assignees brought a fresh action against W. for the price of the timber. Upon a motion, under the 11th section of the Common Law Procedure Act, 1854, to stay the proceedings in the last-mentioned action, this Court held that, assuming the section to apply to such a case (which they inclined to think it did not), it was not one in which they would, in the exercise of their discretion interfere, inasmuch as by so doing they would be giving W. an advantage which the law did not entitle him to.

(1) 6 E. & B. 1020; 26 L. J. (Q.B.) 75. (2) 26 L. J. (Ex.) 399.
(3) 18 C. B. 651; 27 L. J. (C.P.) 9.

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Joyce, in support of the rule. In *Russell* v. *Pellegrini* (1), by an agreement in writing, a ship was chartered at a fixed sum per month; the charterparty providing that, "should any difference of opinion arise between the parties to this contract either in principle or detail, the same shall be referred," &c. The charterer claimed from the ship-owner damages for an alleged breach of an implied warranty of seaworthiness, and desired to have this claim referred, which the ship-owner declined. The charterer thereupon commenced an action. The monthly hire having become due the ship-owner demanded it from the charterer, and, on his refusal, commenced an action against him. The ground of refusal was that the charterer desired to have all matters referred together, whereby he would have the benefit of a set-off. On a rule obtained by the charterer to stay proceedings in the ship-owner's action, the Court of Queen's Bench held (Wightman, J., dubitante,) that, though there was no dispute as to the subject-matter of the action itself, viz. the hire, which was admitted to be due, the circumstances gave the Court jurisdiction under the 17 & 18 Vict. c. 125, s. 11: and they, being satisfied, notwithstanding the pendency of the cross-action, that the charterer had always been desirous to refer all matters, and that the application was bonâ fide, and that justice would be done by staying the action, made the rule absolute to stay proceedings. It is impossible to distinguish that case from the present. *Wickham* v. *Harding* (2) is also an authority in favour of this application.

ERLE, C.J. I think this rule should be made absolute. I retain the opinion I expressed in *Russell* v. *Pellegrini*. (1)

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule absolute. (3)

Attorneys for plaintiff: *Field & Roscoe.*
Attorney for defendant: *H. H. Poole.*

(1) 6 E. & B. 1020; 26 L. J. (Q.B.) 75. (2) 28 L. J. (Ex.) 215.
(3) See *Randegger* v. *Holmes*, ante, p. 679.

June 17.

[IN THE EXCHEQUER CHAMBER.]

NEILL AND ANOTHER *v.* WHITWORTH AND OTHERS.

Construction of Contract—Goods "to be delivered ex quay."

A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at Liverpool per ship or ships from Calcutta. The contract contained provisions as to quality, and for arbitration in case of dispute; and then followed—"*The cotton to be taken from the quay:* customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale:"—

Held,—affirming the judgment of the court below,—that the clause as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the sellers, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time, and under reasonable circumstances, the article to be at the buyers' risk and charge from the time of its being landed on the quay.

THIS was an appeal against a decision of the Court of Common Pleas, making absolute a rule to enter the verdict for the defendants.

The declaration stated that the defendants bargained and sold to the plaintiffs, and the plaintiffs bought of the defendants, certain cotton at 15$\frac{1}{8}$*d.* per lb., that is to say, 500 bales of cotton, guaranteed to be October shipment, to arrive from Calcutta at Liverpool per ship or ships, and to be fair Bengal cotton, the said cotton to be taken from the quay, customary allowances of tare and draft, and the invoice to be dated from the date of the delivery of the last bale; the said cotton to be in merchantable condition; the damaged, if any, to be rejected, provided it could not be made merchantable: should the said cotton be transhipped into other vessels arriving, the contract to hold good; but, if any of the vessels should be lost, the contract to be void so far as regarded such ships only: payment for the said cotton to be made in cash within ten days made equal to ten days and three months, and cash on account to be paid before delivery if required: Averment, that all conditions were fulfilled and all things happened, &c., to entitle the plaintiffs to the delivery of the said cotton as agreed: Breach, that the defendants made default in delivering the said cotton as agreed; whereby the plaintiffs lost the profits, &c., and were prevented from fulfilling a contract entered into by them for

the re-sale of the said cotton, and thereby lost great gains, and by reason of the premises plaintiffs incurred expenses in endeavouring to procure the delivery of the cotton as agreed.

Pleas,—first, that the defendants did not bargain and sell to the plaintiffs, and the plaintiffs did not buy from the defendants, the cotton in the declaration mentioned, upon the terms alleged,—secondly, that the defendants did not make default in delivering the cotton as alleged,—thirdly, that the plaintiffs were not ready and willing to accept the cotton according to the terms of the contract in the declaration mentioned. Issue thereon.

At the trial, at the Liverpool summer assizes in 1865, the following facts appeared in evidence:—The plaintiffs are cotton merchants carrying on business in London, and the defendants are cotton merchants at Manchester. The action was brought to recover special damages for the non-delivery of 500 bales of cotton to arrive from Calcutta to Liverpool, to be taken from the quay pursuant to a contract made on the 2nd of October, 1863; whereby the plaintiffs were prevented from fulfilling a contract entered into by them for the re-sale of the cotton; and they sought to recover damages for the loss of a profit of $3\frac{3}{8}d.$ per lb., at which they had sold it.

On the 2nd of October, 1863, Messrs. Trueman & Rouse, as brokers on behalf of the parties, made the contract between them in respect of the 500 bales of cotton by bought and sold notes. The bought-note, with which the sold-note corresponded, was as follows:—

"Bought for account of Messrs. Neill, Brothers, of B. Whitworth & Brothers, Manchester, 500 bales of cotton, at $15\frac{1}{8}d.$ per lb., guaranteed October shipment, to arrive from Calcutta to Liverpool per ship or ships: the cotton guaranteed fair Bengal; any slight variation in mark not to vitiate this contract. In case of dispute, the matter to be referred to two respectable brokers, who shall decide as to quality and the allowance to be made. The cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale. To be in mercantile condition; the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transhipped in vessels arriving, the contract to hold good; but, if any of the vessels be lost, the contract to be void as

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far as regards such ships only. Payment, cash within ten days made equal to ten days and three months. Cash on account before delivery, if required."

On the 28th of October, 1863, the plaintiffs re-sold the 500 bales, at a profit of $3\frac{3}{8}d.$ per lb., to Mr. H. Clark, of Liverpool, and such re-sale was made on a precisely similar contract as the sale by the defendants to the plaintiffs, except that the price was $18\frac{1}{2}d.$ instead of $15\frac{1}{8}d.$

On the 8th of January, 1864, the defendants, in fulfilment of the contract of the 2nd of October, 1863, declared the following cotton, viz. 25 bales per *Talavera*, 250 bales per *Fort George*. Upon this declaration the plaintiffs on the same day, through their brokers, wrote a similar declaration in respect of the same ships and cotton to their purchaser, Clark.

On the 3rd of February, 1864, the *Talavera* arrived at Liverpool with a cargo of cotton sufficient to fulfil the contract for 250 bales. The *Fort George* was wrecked in Carnarvon Bay, and the cotton shipped therein, and which was sufficient to fulfil the contract for the remaining 250 bales, arrived from Carnarvon by rail at Liverpool, and was placed in the wreck transit shed at Liverpool on the 24th of February, 1864.

It was agreed to be taken by both parties at the trial that the wreck transit shed was to be considered as part of the quay. Cotton on the quay, according to regulations, must be removed in twenty-four hours; if not, the dock trustees can impose a fine, and they have a power compulsorily to warehouse it.

After the arrival of the *Talavera* and the cotton ex *Fort George* respectively, applications were from time to time made by the plaintiffs to the defendants for delivery orders for the cotton which had been expected to arrive by such vessels; and similar applications were also made by Clark to the plaintiffs. Before such delivery orders were given, however, the cotton had been removed from the quay and placed in warehouses. After such removal, the defendants offered the plaintiffs delivery orders for the cotton contracted to be sold, which the plaintiffs declined to accept, on the ground that delivery had not been made ex quay.

Upon the plaintiffs declining to accept the delivery orders on

the above ground, the defendants offered to deliver both lots from the warehouses where it had been stored, at quay weights; but the plaintiffs refused to allow this to be done. The plaintiffs never alleged any other reason for declining to receive the cotton than the reason above referred to, viz. that it had not been delivered ex quay. Clark declined to receive the cotton for the same reason as the plaintiffs.

The market price or value of similar cotton at the time when the contract should have been fulfilled was $1\frac{1}{8}d.$ in excess of the contract price.

Upon the above evidence, the learned judge, with the consent of both parties, directed the jury to find a verdict for the plaintiffs, damages 2109*l.* 17*s.* 6*d.*, with leave to the defendants to move to enter a verdict for them or reduce the same; the Court to have power to draw inferences of fact and to make any amendment the judge at nisi prius might have made.

A rule nisi was accordingly obtained in Michaelmas Term, 1864, which was made absolute in Hilary Term, 1865, the Court of Common Pleas holding that the clause as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time and under reasonable circumstances, the article to be at the buyers' charge from the time of its landing on the quay. (1)

The case was argued in the Exchequer Chamber before Pollock, C.B., Channell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

Mellish, Q.C. (with him *C. Russell*), for the plaintiffs. The true effect of the words of the contract, "the cotton to be taken from the quay," is, to appoint a time and place for its delivery, and not, as was held by the court below, a mere stipulation in favour of the sellers, to enable them to call upon the vendees to take the cotton from the quay, in order to save them from charges thereon,—or, in other words, that the purchasers were bound to be ready to take the cotton at the quay if the vendors were there ready to deliver it. That, it is submitted, is not the proper construction of a

(1) See 18 C. B. (N.S.) 435; 34 L. J. (C.P.) 155.

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mercantile contract. Where an act is to be done by both parties to a contract, primâ facie it is a stipulation binding upon both. If the expression had been "The cotton to be delivered on the quay," there could be no doubt. The contract must be assumed to have been made subject to the usual course of business. The defendants were bound to shew a tender of the delivery order within the twenty-four hours allowed by the dock regulations for cotton to remain upon the quay. It is consistent with all the facts of the case that the vendors had not bought any cotton until after the bales in question had been warehoused. Unless the construction contended for is the true one, viz. that the time and place of delivery are ascertained by the course of business, there is no time at all fixed for the delivery of the cotton by the vendors.

Holker (with him *Brett, Q.C.*), contrà, was not called upon.

POLLOCK, C.B. I believe we are all of opinion that the judgment of the Court below must be affirmed, and for the reasons assigned in that judgment, which are perfectly satisfactory to us.

BLACKBURN, J. The particular words of the contract upon which the argument turns mean no more than that the vendees shall bear any extra expense incurred by the removal of the cotton to the warehouse, as the Court below construed it.

The rest of the Court concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Cotterill & Sons.*

Attorneys for defendants: *Walker & Twyford.*

FRY AND OTHERS *v.* THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA.

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June 21.

Ship and Shipping—Bill of Lading—Lien for freight.

A charterparty contained the following clause—"The ship to have a lien on cargo for freight, 3*l.* 10*s.* per ton of fifty cubic feet, measured in Shanghai, to be paid to the captain or his agents on right delivery at port of discharge . . . . the freight to be paid on unloading and right delivery of the cargo."

The charterers shipped part of the cargo themselves under a bill of lading, containing the following clause—"Freight for the said goods payable in Liverpool as per charterparty." The charterers having indorsed this bill of lading to A. for valuable consideration:—

Held, that as against A. the shipowner had a lien only for the freight due for the goods included in the bill of lading, at the rate of 3*l.* 10*s.* a ton, and not a lien for the whole chartered freight.

SPECIAL case stated without pleadings, the material parts of which were as follows:

The plaintiffs were the owners of the ship *Her Majesty*, and on the 12th of September, 1864, Messrs. Dadabhoy and Co. chartered that ship, which was then at Shanghai, to take a cargo of cotton and other merchandise, which they bound themselves to ship in the usual manner to Liverpool or London, as ordered. Amongst other clauses, the charterparty contained the following: "And being so loaded shall therewith proceed to London or Liverpool, as ordered at Shanghai, and deliver the said cargo on being paid freight as follows: the ship to have a lien on cargo for freight, three pounds ten shillings (3*l.* 10*s.*) sterling per ton of fifty (50) cubic feet measured in Shanghai, to be paid to captain or his agents on right and true delivery at port of discharge (the act of God, the Queen's enemies, &c. &c. always excepted), the freight to be paid on unloading and right delivery of the cargo."

The charterers shipped themselves 185 packages of tea under a bill of lading, which contained the following clause: "Freight for the said —— payable in Liverpool, as per charterparty, with primage and average accustomed."

Most of the other goods were shipped by various merchants at freights lower than that payable under the charterparty, the total difference between the amount of freight payable under the

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charterparty and under the bills of lading being 1710*l.* 8*s.* 10*d.* After the shipment of the goods, Dadabhoy & Co. applied to the defendants to make them an advance on the security of the same, and it was agreed that, on receiving the bill of lading for them, and also a letter of hypothecation, the defendants should negotiate their draft for 1250*l.*, and this arrangement was accordingly carried out. No copy of the charterparty was handed to the defendants, and they were not acquainted with its contents; they were, however, given to understand that the freight was 70*s.* per ton. Shortly after the ship sailed Dadabhoy & Co. failed, their draft was dishonoured, and it is still unpaid.

The ship arrived at Liverpool, and all the goods shipped by merchants other than the charterers were delivered to the consignees on payment of the freight according to the bills of lading; and this, calculating the freight for the portion of the cargo shipped by the charterers at the charterparty rate, left a deficiency upon the total amount of freight payable upon the cargo according to the charterparty of 1710*l.* 8*s.* 10*d.* The defendants thereupon claimed to be entitled to delivery of the goods mentioned in the bill of lading on payment of freight for the same at the rate of 3*l.* 10*s.* a ton; the plaintiffs, however, claimed to be entitled to a lien thereon for the whole balance of the freight due and unpaid under the charterparty.

The question for the opinion of the Court was, whether the plaintiffs had a lien as against the present defendants upon the said tea for the unpaid balance of freight due under the charterparty, or any part thereof.

Watkin Williams for the plaintiffs. The charterparty contains a special provision: "The ship to have a lien on cargo for freight;" therefore, as between the shipowner and the charterer, no doubt the former had a lien for the whole freight on every portion of the goods put on board by the latter. No doubt, therefore, a lien for the whole freight attached to the particular goods now in question as soon as they were put on board the ship, and the only doubt is, whether the shipowner relinquished that lien by the bill of lading he gave. It would seem that if the holder of a bill of lading take it collusively, knowing that the rate of freight under it is less than

under the charterparty, the shipowner still has a lien for the freight on the goods included in it at the rate mentioned in the charterparty: *Faith* v. *East India Company* (1); but probably mere notice of the charterparty is not sufficient. In *Pearson* v. *Göschen* (2), the Court seems to have held that it depended on whether the holder of the bill of lading was in the same interest as the charterers. In *Kern* v. *Deslandes* (3) Gregory and Co. were much in the same position with regard to the charterers as the present defendants, but it was held that they could not claim the goods without payment of the chartered freight. But further, the clause in the bill of lading must be held to incorporate the whole of the provisions of the charterparty relating to freight. If the charterparty had named a lump sum for the freight, the goods under such a bill of lading would have been clearly liable to a lien for the whole: *Chappel* v. *Comfort* (4); *Wegener* v. *Smith* (5); *The Norway.* (6) The clause in the present case is "freight" as per charterparty, not "rate of freight," and means, therefore, that the goods shall be subject to all the stipulations in the charterparty respecting freight, one of which is, that there shall be a lien on each part of the goods for the whole freight.

[BYLES, J. Would not that interpretation render the whole bill of lading nugatory?]

It would, as far as the question of freight is concerned, but our only inquiry is what the bill of lading really means.

[BYLES, J. But ought we not to read the clause in the bill of lading, if possible, so as to give it some effect?]

The case of *Sanders* v. *Vanzeller* (7) contains a declaration directly in the plaintiffs' favour, though the case went off on another point.

[BYLES, J. There, Tindal, C.J., puts it doubtfully as the opinion of some of the judges only.]

In *Smith* v. *Sieveking* (8) Parke, B., refers to that case, and says

(1) 4 B. & Ald. 630.
(2) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.
(3) 10 C. B. (N.S.) 205; 30 L. J. (C.P.) 297.
(4) 10 C. B. (N.S.) 802; 31 L. J. (C. P.) 58.
(5) 15 C. B. 285; 24 L. J. (C.P.) 25.
(6) 3 New Rep. 612.
(7) 4 Q. B. 260.
(8) 5 E. & B. 589.

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that the judges were divided, but that he thought the bill of lading did not constitute a fresh contract.

Quain (*Field, Q.C.*, with him) for the defendants. The defendants were bonâ fide indorsees, for value, and had no notice of the contents of the charterparty, except with respect to the rate of freight: they did not even know that the shippers, Dadabhoy & Co., were the charterers of the vessel. It would require, therefore, stronger words than those in the bill of lading to render the terms of the charterparty binding on them. All the cases that have been cited are really in favour of the defendants. *Chappel* v. *Comfort* (1) and *Wegener* v. *Smith* (2) shew that stronger words, such as are found in those cases, are required to incorporate the terms of the charterparty. In *Kern* v. *Deslandes* (3), Gregory & Co., the real plaintiffs, were not third parties, but really identified with the charterers, and in the judgment, cases like the present were carefully distinguished. *Smith* v. *Sieveking* (4) is also in the defendants' favour. The last case that has been decided on this subject is *Russell* v. *Niemann.* (5)

Watkin Williams, in reply.

ERLE, C.J. I am of opinion that our judgment should be for the defendants. The case turns on the construction of the words in the bill of lading, "freight for said" (goods I interpose) "payable as per charterparty." The rate of freight in the charterparty is 3*l.* 10*s.* a ton, and I think the true construction of the words is, that they refer to the charterparty for the purpose of determining what the rate of freight is, and that it is to be that which is mentioned in the charterparty.

The charterparty also contains the clause, "ship to have a lien on the cargo for freight," and it is said that this entitles the shipowner to a lien on each part of the cargo for the whole freight. I think the judgment of Willes, J., in *Chappel* v. *Comfort* (1), applies in terms to this case as soon as it has been decided that the above is the interpretation of the words in the bill of lading. I agree

(1) 10 C.B. (N.S.) 802; 31 L. J. (C.P.) 58.
(2) 15 C.B. 285; 24 L. J. (C. P.) 25.
(3) 10 C. B. (N.S.) 205; 30 L. J. (C.P.) 297.
(4) 4 E. & B. 945; 24 L. J. (Q.B.) 257; in error, 5 E. & B. 589.
(5) 17 C. B. (N.S.) 163; 34 L. J. (C.P.) 10.

with it that if it is wished to include more of the terms of the charterparty, words ought to be introduced into the bill of lading which would shew that intention more plainly.

MONTAGUE SMITH, J. I am of the same opinion. The defendants are entitled to the delivery of the goods, according to the terms of the bill of lading, and the question is what those terms are. By it, the plaintiff undertakes to deliver the goods "freight for the said ——," which blank must be filled up by the word packages, or some similar word, "payable as per charterparty." I think that condition means that the amount of freight payable for those packages shall be that which is mentioned in the charterparty as payable for them, and for them only. I quite agree it would require very strong words to render the defendants liable for the freight, payable under the charterparty for the whole cargo. I think the case differs essentially from those in which the freight mentioned in the charterparty was a lump sum. The case most relied upon by the plaintiff is *Kern* v. *Deslandes* (1); there, however, the Court assumed that Gregory & Co., who negotiated the bill of lading, were really representing the charterers, and on that assumption it is distinguishable.

ERLE, C.J. My Brother Byles was of the same opinion as far as he heard the case.

Judgment for the defendants.

Attorneys for plaintiffs: *McLeod, Stenning, & Watney.*
Attorneys for defendants: *Clarke, Son, & Rawlins.*

(1) 10 C. B. (N.S.) 205; 30 L. J. (C.P.) 297.

1866
May 24.

GRAY *v.* RAPER and Six Others.

Joint-Stock Company—Winding-up under The Companies Act, 1862, 25 & 26 *Vict. c.* 89—*Amendment; adding a Plea.*

The defendants, who were members of an unregistered society enrolled and certified under The Industrial and Provident Societies Act, 15 & 16 Vict. c. 31, gave a promissory note in the following form for a debt of the society:—"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," &c.:—

Held, that they were personally liable.

After the making of this note the society was registered under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), and, after action brought, an order was obtained for winding it up under the Companies Act, 1862 (25 & 26 Vict. c. 89), and proceedings, under that order, were taken in the county court. Section 202 of the Companies Act, 1862, enacts that where an order has been made, winding up an unregistered company, no suit or other legal proceeding shall be commenced or proceeded with against any contributory to the company, in respect of any debt of the company, except with the leave of the Court. The plaintiff had not obtained leave to proceed:—

Held, that the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action; but only, if at all, by application to the court in which the proceedings under the winding-up order were being pursued.

Quære, per Willes, J., whether the power of amendment at nisi prius extends to the allowance of such a plea?

This was an action against the defendants as joint makers of a promissory note for 100*l*. Plea, that the note was not the defendants' note, as alleged.

The cause was tried before Keating, J., at the sittings in London after last Hilary Term.

The plaintiff, a builder, having done work for a society or club called The London and South Western Railway Co-operative Society, which was constituted, and whose rules were in February, 1855, duly certified, under The Industrial and Provident Societies Act, 15 & 16 Vict. c. 31, received from the defendants, who were members of the society and formed the executive committee thereof, a promissory note in the following form:—

"£100 0*s.* 0*d.* May 8th, 1861.

"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the London and South

Western Railway Co-operative Society, do jointly promise to pay to Mr. William Gray, or order, the sum of one hundred pounds, value received."

The note was signed by the seven defendants, and witnessed by John Wilson, the society's then secretary.

By one of the society's rules (the 11th) it was provided that "all contracts entered into or sanctioned by the executive committee in the name of the society for any purpose relating to any business carried on or intended to be carried on by it in conformity with the rules for the time being, shall bind all members of the society, who, in the event of a deficiency of the assets of the society, shall be liable to pay all sums due by virtue of such contracts, or borrowed upon any bonds, and all the debts of the society: but the members, as between themselves, and as between themselves and the society, shall be liable only to contribute rateably towards the payment of any such moneys or debts in proportion to the number of shares they may respectively have in the society; and the sum so liable to be contributed by the members, shall be considered as a debt due by the society: and the signature of the secretary of the society for the time being to any writing purporting to be such a contract shall be conclusive evidence in all claims thereunder that the same was entered into in conformity with the rules of the society."

The society was subsequently to the making of the note registered under The Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, by the 6th section of which it is enacted that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society; and all legal proceedings then pending by or against any such trustee or other officer on account of the society may be prosecuted by or against the society in its registered name, without abatement."

After the commencement of the action, an order was obtained for winding up the society under The Companies Act, 1862, 25 & 26 Vict. c. 89, the proceedings under which were progressing in the county court, under the 17th section of The Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87.

It was contended on the part of the defendants that the society

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was liable for the debt in question, and not the defendants individually; and that, inasmuch as the society was in the course of being wound up under the provisions of The Companies Act, 1862, which are by the 17th section of The Industrial and Provident Societies Act, 1862, applied to societies of this description, the plaintiff could not proceed with the action until he had complied with the 202nd section of The Companies Act, 1862, which enacts, that, "where an order has been made for winding up an unregistered company, in addition to the provisions hereinbefore contained in the case of companies formed under this act, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory to the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose."

For the plaintiff it was insisted that the defendants were liable personally on the note, and that there was no plea upon the record to raise the defence suggested, even if it were well founded.

The learned judge overruled the defendants' objection, and directed the jury to find for the plaintiff; but he reserved leave to the defendants to move to enter a verdict for them, if the Court should be of opinion that they were not liable personally, or that the 202nd section of the 25 & 26 Vict. c. 89 afforded an answer to the action; reserving leave also to the defendants to add a plea, if necessary, to raise the defence.

M'Calmont, in Easter Term, obtained a rule nisi accordingly, on the ground that, as the company was being wound up under the 202nd section of the 25 & 26 Vict. c. 89, this Court had no jurisdiction.

Prentice shewed cause. The 202nd section of the 25 & 26 Vict. c. 89 applies only where the defendant is being sued as a member of the company. Here, the action is against the defendants personally upon their note. It is true they describe themselves therein as members of the executive committee, and that they are acting on behalf of the society: but that does not relieve them from personal liability.

[WILLES, J. Does the power of amendment apply to a plea to the jurisdiction?]

Whether such a plea as that proposed could be allowed or not, it is clear it would be no answer to the action. If the 202nd section could avail the defendants at all, it could only be by an application to the judge of the county court to stay the proceedings. In *Penkivil* v. *Connell* (1), the defendant, a director and shareholder in a joint-stock company, together with three others, made a promissory note as follows:—"We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of this company, jointly and severally promise to pay to H. H. or bearer, on &c., the sum of &c., for value received,"—signed A. B., C. D., E. F., "directors." The defendant having been sued upon this note in his individual capacity, it was held that the case did not fall within The Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45, s. 73, and that there was no ground for staying the action until the plaintiff should have proved his debt before the master appointed to wind up the affairs of the company. Alderson, B., puts the case upon the true ground. He says: "The Court, no doubt, under particular circumstances, has power to stay actions brought against members of public companies,—as, for instance, where a person is sued as a member of the provisional committee after an official manager has been appointed to wind up the affairs of the company. But, in the present case, the defendant is not sued for a debt due by him as a member of the company, but for the recovery of a debt for which he is personally and individually responsible, and for which he would be equally so if no company existed."

[BYLES, J. In *Healey* v. *Story* (2), the defendants, who were directors of a joint-stock newspaper company, gave the plaintiff the following promissory note, in part payment for the purchase of a newspaper which the company had agreed to purchase of him:—"On demand, we jointly and severally promise to pay to Mr. L. H., or order, the sum of 250*l*., value received, for and on behalf of the Wesleyan Newspaper Association,"—signed by the defendants, "directors;" and it was held that the words "jointly and severally" were equivalent to "jointly and personally," and

(1) 5 Ex. 381; 19 L. J. (Ex.) 305. (2) 3 Ex. 3.

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that the defendants were therefore personally liable to the plaintiff on the note.]

M'Calmont, in support of the rule. The debt for which the promissory note in question was given was confessedly a debt of the society, and the 6th section of the 25 & 26 Vict. c. 87 vests in the society all property that may at the time of registration be vested in any person in trust for the society: *Dean* v. *Mellard*. (1)

[ERLE, C.J. Is there anything in the act to transfer the contracts of the individuals to the society?]

It was conceded that this was a debt of the society.

[ERLE, C.J. This is not the proper subject of a plea, but is only to be taken advantage of, if at all, by an application to the Court having jurisdiction in the matter.]

It would seem from the case of *Henderson* v. *Bamber* (2) to be doubtful whether the county court has any power under the statute to make an order restraining the proceedings here.

ERLE, C.J. The defendants are clearly liable upon this note, and the proposed plea would be no defence. The rule must, therefore, be discharged.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorney for plaintiff: *T. Angell.*

Attorneys for defendants: *Newbon & Starkey.*

(1) 15 C. B. (N.S.) 19; 32 L. J. (C.P.) 282.

(2) 19 C. B. (N.S.) 540; 35 L. J. (C.P.) 65.

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Evidence—Deposition of Witness taken under 1 *Wm.* 4, *c.* 22, *Admissibility of—"Permanent" Sickness, what sufficient Proof of—Affidavit of Medical Attendant—Power of Court to review the Judge's Decision.*

Where a statute gives power to a judge at nisi prius to exercise a discretion as to the admission of a document in evidence, his decision is subject to the general supervision and control of the Court out of which the record comes, unless the express language of the statute makes his decision final.

The 1 Wm. 4, c. 22, s. 10, makes the deposition of a witness taken under it inadmissible in evidence, unless it shall appear *to the satisfaction of the judge* that the deponent is unable from *permanent* sickness or other *permanent* infirmity to attend the trial:—

Held, that, though it is competent to the Court to review his decision, it is for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he shall think fit; and that the Court will not interfere, unless it be shewn that the judge has been misled by false evidence, or that injustice has resulted from the course pursued at the trial.

Quære, whether an affidavit of the witness's ordinary medical attendant would be admissible evidence for such a purpose? *Semble*, per Willes, J., that it would.

The word "permanent" in the above section does not mean that the sickness is an incurable one, but imports such a state of disability as to preclude the hope of the deponent being able to attend in any reasonable time.

THIS was an action brought to try the right to a several fishery in the river Usk, which was claimed by the plaintiff as lord of the manor of Crickhowel, in the county of Brecon.

The cause was tried before Blackburn, J., at the last assizes at Brecon. Amongst other evidence tendered on the part of the defendant was the examination upon interrogatories, under the 1 Wm. 4, c. 22, of one Samuel Hawkins, of Marwell Lodge, near Winchester, in the county of Hants. In order to comply with the condition of the 10th section of the statute (1), the managing clerk to the defendant's attorneys was called. He stated that, on Monday, the

(1) Which enacts that "no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or *unable from permanent sickness, or other permanent infirmity, to attend the trial*; in all or any of which cases the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence."

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19th of March (five days before the trial), he, in company with Dr. Bullar, of Southampton, saw Mr. Hawkins, who was in bed, and apparently too ill to move; that his face was in agony when he tried to move, and he said he could not move; that he looked a very old man; and that he said he was seventy-eight or seventy-nine years of age.

It was objected, on the part of the plaintiff, that there was no satisfactory evidence that Mr. Hawkins was unable from *permanent* sickness, or other *permanent* infirmity, to attend the trial; the witness who deposed to his condition five days before not being a medical man, and therefore not competent to judge whether or not his then sickness or infirmity was of such a permanent character as the statute required.

The learned judge overruled the objection.

The defendant's counsel also tendered an affidavit of Dr. Bullar, in which that gentleman deposed, "that he regularly attended Mr. Hawkins as his medical adviser; that he saw him on the 19th of March instant; that he was unable from permanent sickness to attend the trial of this action at the assizes for the county of Brecon to be holden at Brecon in this present month; and that the sickness from which he suffered was chronic gout, and at the present time he was confined to his bed with an acute attack of gout in both feet and knees, and was unable to move."

It was objected for the plaintiff that the affidavit was not admissible, inasmuch as there was no opportunity to cross-examine Dr. Bullar as to the grounds upon which he had formed his opinion.

As to this, the report of the learned judge was as follows:—"The affidavit of Dr. Bullar added by Mr. Manisty, to be on my notes, in case the Court think it admissible on such a point."

A verdict having been found for the defendant,

Grove, Q.C., in Easter Term last, obtained a rule nisi for a new trial, on the ground that the deposition of Mr. Hawkins ought not to have been admitted.

Manisty, Q.C., *Dowdeswell*, and *T. H. Allen*, shewed cause. The statute 1 Wm. 4, c. 22, s. 10, makes the deposition receivable in evidence if the judge is satisfied that the witness is unable from

permanent sickness, or other permanent injury, to attend the trial. It is not a matter for the jury: *Bartlett* v. *Smith.* (1) The judge is to be satisfied by reasonable evidence. He is to exercise a judicial discretion upon the subject. His decision is final: *Winsor* v. *The Queen.* (2) There are many instances in which the Court, though it undoubtedly has a general power of supervision, cannot interfere with the discretion exercised by the judge at nisi prius. Thus, where the judge has power under a statute to certify as to costs, the giving or withholding the certificate is left entirely to his discretion, without any control of the Court: *Twigg* v. *Potts* (3); *Cann* v. *Facey* (4); *Barker* v. *Hollier* (5); *Merrick* v. *Wakley.* (6) Even under the 15 & 16 Vict. c. 54, s. 4, where the power is given to the Court or a judge, the Court will not exercise it by way of appeal from the judge, except upon very strong grounds, —*Dunston* v. *Paterson* (7); nor upon facts substantially the same as those which were before the judge: *Hatch* v. *Lewis.* (8) So, in the case of a schoolmaster dismissed by trustees, the discretion of the trustees has been held to be final: *Reg.* v. *Darlington School* (9); *Doe* d. *Childe* v. *Willis.* (10) In *Stanhope* v. *Thorsby* (11), the Court refused to interfere with the discretion of a magistrate in granting a licence for the removal of cattle under the orders with reference to the cattle plague, or to inquire into the sufficiency of the evidence upon which he acted. Reasonable proof of inability is all that can be required: Starkie on Evidence, 4th ed. 412.

[WILLES, J., referred to *Henman* v. *Lester.* (12)]

If the Court had the power to review the decision of the judge upon this point, this is not a case in which they would exercise it. There was abundant evidence that Mr. Hawkins was unable to attend the trial. He was confined to his bed with gout, and was nearly eighty years of age; and, although the witness who spoke as to his condition was not a medical man, he was accompanied on

(1) 11 M. & W. 483.
(2) 1 Law Rep. Q.B. 390.
(3) 4 Dowl. 266.
(4) 4 Ad. & E. 68; 5 N. & M. 405.
(5) 8 M. & W. 513.
(6) 11 L. J. (Q.B.) 249.
(7) 5 C. B. (N.S.) 267; 28 L. J. (C.P.) 97.
(8) 7 H. & N. 367; 31 L. J. (Ex.) 26.
(9) 6 Q. B. 682.
(10) 5 Ex. 894; 20 L. J. (Ex.) 85.
(11) Ante, p. 423.
(12) 12 C. B. (N.S.) 776; 31 L. J. (C.P.) 366.

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his visit by the ordinary medical attendant of the witness. The learned judge was clearly warranted upon that evidence in receiving the deposition. Further, there was the affidavit of Dr. Bullar, which was admissible for this purpose. Such an affidavit was received by Pollock, C.B., in a case of *Knight* v. *Campbell*. (1)

[MONTAGUE SMITH, J. The judge thought the evidence sufficient without the affidavit of Dr. Bullar.]

In *Reg.* v. *Stephenson* (2), which arose upon the 11 & 12 Vict. c. 42, s. 17, the words of which are, "is so ill as to be unable to travel," it was held that the question whether the illness proved is or is not within the statute, is a question for the determination of the judge presiding at the trial, and that the Court will not interfere with the exercise of his discretion.

Grove, Q.C., *H. Giffard, Q.C.*, and *G. B. Hughes*, in support of the rule. The admissibility of the deposition is primâ facie a question for the presiding judge, but his decision is subject to review: and here the learned judge in truth pronounced no absolute decision, but he expressly reserved it for the Court. The general principle is thus stated in Taylor on Evidence, 4th ed. 34—36: "The first duty of a judge presiding at a trial by jury is threefold: first, he must decide all questions respecting the admissibility of evidence." . . . "In discharging this first duty, it frequently happens that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the judge, and adjudicated by him *alone*." The editor then proceeds to cite examples,—amongst others: "So, if proof be offered of the signature of an attesting-witness, and the admissibility of this evidence turns on the fact whether or not the witness has absented himself from the trial by collusion with the opposite party, the judge must decide on the existence of this fact. In like manner, if the question be whether a document has been duly executed or stamped; or whether it comes from the right custody; or whether sufficient search has been made for it to admit secondary evidence of its contents; or whether notice to produce it has been duly

(1) Guildford summer assizes, 1848, cited (and doubted) in 1 Taylor on Evidence, 4th ed. 474.

(2) Leigh & Cave, C. C. 165.

served; or whether, in the event of its being produced under notice, it be the original paper required; or whether it is protected as being a confidential communication; or if a witness be objected to on the ground of infidelity or imbecility of mind: in all these and the like cases the preliminary question of admissibility must in the first instance be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion." But he adds: "The judge merely decides whether there is primâ facie any reason for presenting it at all to the jury; and his decision on the point, if erroneous, may be reviewed by the Court above:" *Cleave* v. *Jones*. (1) All that the statute means, when it uses the expression, "unless it shall appear to the satisfaction of the judge," is, that the matter is to be disposed of without being submitted to the jury: it did not mean to oust the general jurisdiction of the Court. In *Doe* d. *Jacobs* v. *Phillips* (2), a deed more than thirty years old, creating a term to attend the inheritance, was produced from the custody of the plaintiff's attorney. The plaintiff was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of the defendants, who were beneficially interested in the premises to which the deed related, and it was not shewn for whom the attorney held the deeds. The judge, considering that there was no sufficient evidence of proper custody, refused to allow the deed to be read: and the Court overruled his decision, and directed a new trial. It is difficult to conceive a more precise authority.

[WILLES, J. In *Quilter* v. *Jorss* (3), this Court entertained a motion for a new trial on the ground that the judge had erroneously ruled that sufficient search had been made to let in secondary evidence of a lost agreement. The cases as to certificates for costs are altogether different.]

The like was held in *Doe* d. *The Earl of Shrewsbury* v. *Keeling* (4), where the evidence had been rejected. *Rees* v. *Walters* (5) and *Doe* d. *Jenkins* v. *Davies* (6) are authorities to the same effect.

(1) 7 Ex. 421; 21 L. J. (Ex.) 105.
(2) 8 Q. B. 158.
(3) 14 C. B. (N.S.) 747.
(4) 11 Q. B. 884.
(5) 3 M. & W. 527.
(6) 10 Q. B. 314.

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In *Doe* d. *Wright* v. *Tatham* (1), counsel observing in the course of the argument, that, "where a question of fact arises at nisi prius, on the solution of which it depends whether certain evidence is admissible or not, the judge becomes a judge of fact as to that interlocutory matter," Parke, B., says, "It is correct that, on such a collateral matter of fact, the judge should decide; but his judgment is liable to review." An erroneous ruling of the judge as to which party has the right to begin, has been held to be ground of motion: *Doe* d. *Bather* v. *Brayne* (2); *Sutton* v. *Sadler* (3); *Brandford* v. *Freeman.* (4) So, in *Sharples* v. *Rickard* (5), an erroneous ruling of the judge as to the necessity of affixing an adhesive stamp on a foreign bill of exchange was held to be the subject of review.

[BYLES, J. Would a bill of exceptions lie upon an erroneous ruling on such a point as this?]

Clearly not: and that affords an additional ground for reviewing the decision of the judge on motion. All that a judge does, whether in court or at chambers, is subject to review, unless the appeal to the Court is expressly taken away by statute. *Stephenson's* case (6) does not apply here; the Court of Criminal Appeal only having jurisdiction to decide on pure questions of law. In *Harrison* v. *Blades* (7) it was held to be no sufficient ground for receiving evidence of the handwriting of a witness (which would be receivable if he were dead), that he is unable from indisposition to attend the trial, and lies without hopes of recovery. "I cannot," said Lord Ellenborough, "dispense with the attendance of a witness who is still alive and within the jurisdiction of the Court, so as to admit evidence of his handwriting in the same manner as if he were actually dead. No case has yet gone so far; and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there

(1) 7 Ad. & E. 313, 356.
(2) 5 C. B. 655.
(3) 3 C. B. (N.S.) 87; 26 L. J. (C.P.) 284.
(4) 5 Ex. 734; 20 L. J. (Ex.) 36.
(5) 2 H. & N. 57; 26 L. J. (Ex.) 302. But now, by the 17 & 18 Vict. c. 125, s. 31, it is enacted that "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."
(6) Leigh & Cave, C. C. 165.
(7) 3 Camp. 457.

would be very sudden indispositions and recoveries. Where a witness is taken ill, the party who would avail himself of his testimony must move to put off the trial. If he be in a very dangerous condition, he will probably be dead before the ensuing sittings, and then the evidence of his handwriting may be received without any risk of collusion." That is the real ground of the distinction between the language of this statute and that of the criminal statute, 11 & 12 Vict. c. 42, s. 17. The case of *Reg.* v. *Riley* (1), though a decision upon the criminal statute, is peculiarly applicable here. It was there ruled by Patteson, J., that, where a witness is ill, and is attended by a surgeon, the judge at the trial will not receive the witness's deposition in evidence under the 11 & 12 Vict. c. 42, s. 17, unless the surgeon attend at the trial to prove that the witness is unable to travel; but that where a witness is permanently disabled, and is not attended by a surgeon, other evidence that he is unable to travel may be sufficient: and that, where the witness is attended by a surgeon, and a person proves at the trial that he, on the 18th of March, saw the witness in bed, and that he appeared ill, the commission day being the 21st and the trial the 23rd, this is not sufficient proof of the illness of the witness to render his deposition admissible. The proper course here was to ask for a postponement of the trial. The decision of the learned judge in effect excises the word "permanent." That word is used in the act relating to the removal of the poor, 9 & 10 Vict. c. 66, s. 4. The affidavit of Dr. Bullar, even if admissible, as to which there is no authority except the case cited in Taylor on Evidence, 4th ed. 474, the correctness of which the learned author doubts, does not by any means shew that Mr. Hawkins was suffering under any permanent illness: all it amounts to is that that gentleman was unable to attend at the then assizes.

ERLE, C.J. I am of opinion that this rule should be discharged. The plaintiff seeks to have a new trial, on the ground of the improper reception of evidence. The evidence which was received was the examination upon interrogatories under the statute 1 Wm. 4, c. 22, of one Hawkins, and the learned judge received it

(1) 3 Car. & K. 116.

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upon oral testimony which established to his satisfaction that Mr. Hawkins was unable from permanent sickness or other permanent infirmity to attend the trial. The oral testimony was that of the managing-clerk of the defendant's attorney, who went to see the witness, and who described his condition and symptoms. It is now said that the learned judge acted upon evidence which ought not to have satisfied him, and therefore that we ought to grant a new trial. One question which has been raised before us is, whether we have jurisdiction to review the judge's decision. The words of the 10th section of the statute are, that no examination or deposition taken thereunder shall be read in evidence "unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial." It was urged (as I thought with much force and clearness) that the statute contemplated that the decision of that point should rest entirely with the judge who presided at the trial, making him supreme, and giving power to no other tribunal to review his discretion. But upon that point the arguments which have been urged by Mr. Grove and the learned counsel who followed him have satisfied me that that view of the statute cannot be sustained. The judge who presides at nisi prius sits as a member of, and his decisions are subject to review by, the Court from which the record comes, unless he is acting under a statute the language of which expressly negatives or excludes the application of that general principle. Looking at the words of this statute, I have come to the conclusion that they are not sufficient to deprive the Court of that ordinary jurisdiction. If the statute had contained negative words, the question would have presented itself in a very different shape. The result is, that, in my opinion, the decision come to by my Brother Blackburn in this case is subject to review. Then, having this general jurisdiction, ought we to exercise it in this case by holding that the learned judge fell into a mistake, and grant a new trial? Upon that part of the case I think the rule fails. There is a strong primâ facie presumption in favour of his ruling. The judge before whom the matter comes for decision has the best means of deciding correctly. He has the evidence of his own eyes: the witnesses are before him; and his experience will enable

him to form a more correct judgment than the Court in banc can from a mere statement of what occurred at nisi prius. I therefore think we ought not to exercise this jurisdiction unless we are clearly satisfied that injustice will be done by our abstaining from doing so. If it was shewn that there had been any deception practised in order to prevent the witness from being subjected to cross-examination, we should of course interpose, in order to prevent such a fraud from succeeding. But it is not suggested that anything of that sort was intended here. Nor do I see any reason for thinking that injustice or prejudice to the plaintiff has resulted from the course taken by the learned judge in admitting Mr. Hawkins's deposition. I cannot see for certain that that gentleman could have attended this trial; and, if he could not, great progress is made towards bringing him within the act. There was good evidence that he was unable from sickness to attend the trial: the great contention has been whether or not that sickness was of a permanent character. The statute could not have meant that the witness shall be in a state of absolute incurability: nor do I think it means anything approaching in degree to that condition. The examination is to be read if it shall appear to the satisfaction of the judge that the examinant is beyond the jurisdiction of the Court, or unable from *permanent* sickness or other *permanent* infirmity to attend the trial. If the witness were just across the border, or on his passage to Dublin or to the Continent, he would clearly be beyond the jurisdiction of the Court, and the judge would be bound to receive the deposition, though the witness's absence might not be permanent. I quite agree with Mr. Grove that it is most material that the statute should not be used as a means to prevent a witness being subjected to cross-examination; but I do not find therein sufficiently stringent provisions to sustain his argument. What degree of permanence of sickness or infirmity will satisfy the statute? There are no words to define it; but I apprehend that the party seeking to use the deposition must shew that the witness could not come to the trial. As far as I am able to judge, there was evidence here that Mr. Hawkins was suffering under sickness of a permanent character which might well warrant the learned judge in coming to the conclusion that it was impossible for him to attend and give his evidence at the trial. To say

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nothing of his having long passed the age of threescore years and ten, and of his being afflicted with chronic gout, it appears that at this particular time he was confined to his bed with an acute attack of gout in both feet and knees, superadded to the ordinary load he was carrying. Was that an untrue or exaggerated account of the condition of the witness? The matter was open to inquiry: and inquiry in fact was made. We are now called upon to say that, upon this testimony as to the condition of the witness, the learned judge was wrong in holding that the requirement of the statute had been complied with, and that the deposition was admissible. I am at a loss to discover any sufficient ground upon which we can come to the conclusion that he has not exercised a right discretion.

WILLES, J. I am of the same opinion. The very question, as to the admissibility of the affidavit of the medical attendant, has already arisen in *Knight* v. *Campbell* (1); and I am far from agreeing with the editor of Taylor on Evidence that the ruling of the Chief Baron at Guildford was an erroneous ruling. I should require to consider the matter very much before I could make up my mind to differ upon a question of that sort from the opinion of a judge of his great experience. I would refer to Tidd's Practice (2) for the practice as to interrogatories for the examination of witnesses abroad, and in Chancery in aid of actions at law. Any doubt which I might feel as to overruling the decision of the Chief Baron in the case above referred to, is fortified by a reference to the case of *Reg.* v. *Ryle* (3), where a commission was issued to inquire whether the defendant was indebted to the Crown, and the only evidence brought before the jury on the execution of the commission was an affidavit that he was indebted to the Crown in a certain sum. Upon a rule to set aside the inquisition for irregularity, Parke, B., says, that the rules of evidence are not so much matter of law as matter of practice laid down by the judges in consequence of their being desirous that the best evidence should be laid before the jury: and he goes on to say, in language singularly like the language of this act of parliament, that the jury are "to satisfy themselves upon all such evidence as would

(1) MS. cited 1 Taylor on Evidence, 4th ed. 474.

(2) 9th ed. pp. 770, 771, and 810.

(3) 9 M. & W. 227.

lead them to find the truth of the debt upon their oaths,—such evidence as would *satisfy* them that the debt existed in point of fact:" and the evidence was held admissible. I cite this for the purpose of shewing that it is not absolutely necessary, as has sometimes been erroneously suggested, that the witness should actually be present at nisi prius, so that he may be submitted to cross-examination. And, when the language of the 1 Wm. 4, c. 22, "unless it shall appear to the satisfaction of the judge," is looked at, I am far from thinking that the Chief Baron was wrong in holding an affidavit of the medical man to be sufficient proof of the permanent sickness of a deponent, to let in his deposition. In many cases proof by affidavit would be the most convenient course, as preventing great and useless expense. The reasons for the contrary, which were pressed by Mr. Grove with great force, and which weighed the most upon my mind, were, the facilities for fabrication, and the known looseness of deponents in swearing to a formula of words written down for them. On the other hand, such an affidavit, if false, would be open to easy exposure. If, upon inquiry, it should turn out that the judge had been imposed upon, a new trial would be granted, and a full indemnity obtained for all the expenses to which the party had been improperly put. As to the meaning of the expression "permanent" sickness in the statute, I entirely agree with my Lord; and I do not propose to add a word. If the legislature had intended to convey what Mr. Grove has suggested, the word used would in all probability have been "incurable." Then comes the question our answer to which is sufficient to dispose of the rule,—what is meant by the words "unless it shall appear to the satisfaction of the judge," &c.? Apart from the considerations I have already discussed as to the media of proof which the judge ought to have before him, I apprehend that the best effect which can be given to those words is this, that, if there is evidence upon which the judge might reasonably hold the deposition admissible, the Court ought not to interfere merely because the evidence offered does not prove to *their* satisfaction that there was such a degree of sickness as to render the deponent unable to attend the trial. That would be to contradict the statute,—to substitute the satisfaction of the Court for the satisfaction of the judge who presides at the trial. I think

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this may be very well illustrated by considering what would be the result if the judge was *not* satisfied at the trial. Suppose the fact of the inability of the deponent to attend the trial was sought to be established by the testimony of a number of witnesses who were interested, or whom, from what appeared in the course of their examination, the judge did not conceive to be persons whose evidence ought to be believed or acted upon though admissible, and he therefore rejected the deposition,—would it be competent to the Court, who had not seen the witnesses, and who consequently would have no means of judging of the amount of credit due to them, to say that they were satisfied, and therefore to grant a new trial? It is true the judge represents the Court; but, like every other fiction of law, that must not be pressed too far. We are driven to this, that, if we are dealing simply with the language of the statute, we have no power to interfere. But the Court is not, therefore, powerless to prevent injustice; because it has a general jurisdiction whereby it is enabled to resist an abuse of its process: and in this jurisdiction is included the power of setting aside verdict after verdict, where it appears to its satisfaction that justice has not been done. The result is, to my mind, that, unless this was the proper subject of a bill of exceptions, the jurisdiction of the Court in granting a new trial ought not to be exercised, even though we should be dissatisfied with that which satisfied the judge, unless it be clearly made out that injustice will be done by withholding it. This may sound strange: but, in practice, it will be found convenient; and there is abundance of authority and illustration to sustain it. In the first place, there is the case of the judge at the trial ruling as to which party has the right to begin. An erroneous ruling upon that point may, no doubt, sometimes be the cause of serious injustice: but it has been settled that the Court will not in such a case interfere by granting a new trial, unless it be shewn that actual injustice has resulted from the course pursued. That was distinctly laid down in *Brandford* v. *Freeman*. (1) Similar doctrine is laid down in yet larger terms in *Black* v. *Jones*. (2) There, the judge having in his summing-up expressed an erroneous opinion upon a point of law adverted to for the collateral purpose of explaining other evidence, a motion

(1) 5 Ex. 734; 20 L. J. (Ex.) 36. (2) 6 Ex. 213; 20 L. J. (Ex.) 152.

was made for a new trial on the ground of misdirection. The rule was refused: and Pollock, C.B., with the assent of Parke and Alderson, BB., laid it down, that "where a judge expresses an opinion upon a point of law, not for the purpose of directing the jury as to the matter immediately before them, but merely adverts to the point for some collateral purpose and in order to explain and give effect to other evidence, such expression of opinion cannot be made the subject of a bill of exceptions, because a bill of exceptions can only be tendered in respect of those matters of law on which a judge is bound to instruct the jury, in order that, he telling them the law, and they deciding the fact, a just conclusion may result from the labours of both." But his Lordship goes on to say: "If at any time the Court should feel that great injustice had been done by an erroneous statement of a point of law, though purely collateral, no doubt it would, in the exercise of its sound discretion, give relief: but we consider that in such a case it is not only proper for the Court, but it is their duty, to see whether the supposed misdirection has really proved any miscarriage." I do not pursue the authorities any further. I have cited enough to shew that the Court does nothing unprecedented or exceptional in saying that they ought not to interfere unless some injustice has been done by an erroneous exercise of discretion by the judge at nisi prius. If that be the rule, upon whom rests the onus of shewing the injustice? Undoubtedly upon the person who complains of what has been done. Then, what is the injustice to be shewn, and has it been shewn here? It is said that wrong was done to the plaintiff, by reason of his having had imposed upon him at the trial the deposition of a witness whom he has had no opportunity of cross-examining. That argument, however, is obviously fallacious, because as to this particular proceeding the legislature has precluded that ground of objection by making the deposition admissible upon the judge being satisfied of the inability of the witness from the causes enumerated to attend the trial. The injustice, if any such there be, may be made out from information received since the trial, shewing that the judge has acted upon an untrue suggestion, and that there was nothing in the witness's condition reasonably calculated to prevent his attendance. No such case, however, has been presented to the Court

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here. There is nothing more than a bare suggestion that the learned judge came to an erroneous conclusion as to the admissibility of the witness's deposition, or that another judge possibly would not come to the same conclusion if a new trial were granted. Upon this latter ground, I am clearly of opinion that the Court ought not to interfere, and that the rule should be discharged.

BYLES, J. I am of the same opinion. I certainly entertained some doubt, until I heard Mr. Grove's argument, as to whether the decision of the judge at nisi prius was not final. That argument has satisfied me that there should be that general power of supervision in this case which is universally exercised in the superior Courts over their officers, ministers, and delegates. The observation of Mr. Hughes, too, that, if the statute had intended that there should be no appeal against the judge's ruling, it would have gone on to say, "whose decision shall be final," was entitled to great weight. But still the onus probandi is now shifted: and it lies upon the person who impeaches his decision to shew that the judge was wrong, and possibly also to shew that some injustice has been done. One of these things at all events he must shew, that the judge was wrong, that some fraud has been practised, or that there has been injustice done. I do not think either is made out here: and, that being so, the decision of the judge must stand. Although I do not wish to be understood as at all dissenting from what has been said by my Brother Willes on the subject of the affidavit, I cannot help observing that the learned judge seems to have decided to receive the deposition of the witness before the affidavit of the medical man was produced. There was some evidence by parol,—that of the defendant's attorney's clerk, who was examined and cross-examined upon oath,—of the inability of the witness Hawkins, from age and bodily infirmity, to be present at the trial. I agree with my Lord and my Brother Willes that it is not easy, nor is it necessary, to define the meaning of "permanent;" it is a word which is susceptible of different meanings under different circumstances. I have but one further observation to make, viz. that in what I have said I desire not to be understood as putting any interpretation upon the statute relating to criminal proceedings, 11 & 12 Vict. c. 42, the words of which are very different,—"If it shall be proved by the oath or affirmation of a credible witness that a person is

dead or so ill as to be unable to travel," &c. Nothing that we decide upon this occasion can have any application to that statute.

WILLES, J. With respect to the statute 11 & 12 Vict. c. 42, I desire to guard myself in the same way that my Brother Byles has done.

MONTAGUE SMITH, J. I am of the same opinion. I entirely agree as to the general jurisdiction of the Court in reviewing the proceedings of the judge who presides on the trial of issues therein; but I do not think that jurisdiction extends to a review in the sense of a substitution by the Court of their discretion for that of the judge in allowing or disallowing depositions taken under this statute to be read before the jury. The words of the act are that no examination or deposition &c. shall be read without consent &c., unless it shall appear *to the satisfaction of the judge* that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial. It is therefore the mind of the judge that is to be satisfied: and I think the Court ought not upon light grounds to assume to put their minds in conflict with his upon the subject, and to say that they are not satisfied with the evidence which satisfied him. There are obvious reasons why such a course would be highly inexpedient. No doubt, if it could be shewn that there was anything like fraud or misrepresentation on the part of the person seeking to use the deposition, the Court has ample power to review the proceedings, and to say that the trial has not been satisfactory. Here I see nothing which the judge has done which he was not perfectly entitled to do. Evidence was given before him which was sufficient to satisfy his mind that the witness was suffering under such a degree of permanent sickness as to incapacitate him from attending at the trial. His mind was satisfied. The utmost that can be said is that two views might be taken of the evidence which was offered upon the subject. The judge, who had that evidence before him, is better able to decide upon its value than the Court, who can only act upon a representation of what passed, which, however faithful, conveys at the best but an imperfect impression of the effect of the testimony. As to the construction of the statute, I incline to think that the words "permanent sickness or other permanent infirmity" imply something more than such a degree of

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sickness or infirmity as would prevent the attendance of the witness at the *particular* trial. No doubt those words may be susceptible of different meanings under different circumstances: but they seem to me to denote something of an enduring character, some sickness or infirmity which may continue beyond the period of the impending trial. It is unnecessary to decide whether or not the affidavit of Dr. Bullar could be read; because, as I understand the report of the learned judge, he had decided to receive the deposition before the affidavit was put in. He seems afterwards to have received the affidavit, in order that we might have it before us in the event of an application to us to review his decision. I think the rule should be discharged, quite independently of the question as to the admissibility or inadmissibility of the affidavit. I am far from saying that the Chief Baron was wrong in the conclusion he is reported to have come to in the case of *Knight* v. *Campbell*. (1) I am by no means satisfied that an affidavit is not legitimate evidence for this purpose. Upon the ground, however, upon which the rest of the Court are unanimous, I also agree that this rule should be discharged. It is hardly necessary to observe that it was not at all a question for the jury.

Rule discharged.

Attorneys for plaintiff: *Watkins, Baker, & Baylis.*
Attorneys for defendant: *Jones & Starling.*

(1) 1 Taylor on Evidence, 4th ed. 474.

[IN THE EXCHEQUER CHAMBER.]

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June 16.

SCRIVENER AND ANOTHER *v.* PASK.

Principal and Agent—Architect and Builder.

The defendant employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it for him. The architect took out the quantities, and represented to the plaintiff, a builder, that they were correct, and the plaintiff thereupon made a tender, which was accepted. The quantities proved to be incorrect, and the plaintiff expended upon the building a much larger amount of materials than he contemplated:—

Held, that there was no evidence that the architect acted as the defendant's agent in taking out the quantities, or that the defendant guaranteed their accuracy, and that, therefore, the plaintiff could not recover more than his contract price.

13 Q. B. 11,
9 Ex. 171

APPEAL from the decision of the Court of Common Pleas, refusing a rule to enter a verdict for the plaintiffs.

The declaration contained a common count for goods sold and delivered, and for work and labour and materials, and on accounts stated, and also a special count upon a guarantee and promise by the defendant that a certain bill of quantities represented the true and correct quantities of certain work and materials to be done and provided.

The defendant pleaded, except as to 210*l.* 7*s.*, never indebted, and payment, payment into court of that sum, and a traverse of the guarantee and promise alleged in the special count.

The plaintiffs joined issue on all the pleas, except the third, and as to that plea took out the money in satisfaction pro tanto. (1)

The cause was tried at the sittings in Middlesex after Hilary Term, 1865. The plaintiffs sought to recover under the common count a balance of 365*l.* 8*s.* 7*d.* for work and materials done and provided by them for the defendant in the erection of a villa at Twickenham. A sum of 240*l.* had been paid on account, and the balance of the contract price, 210*l.* 7*s.*, was paid into court.

The agreement under which the work was done was dated the 15th of April, 1864, and was made between the defendant of the first part, the plaintiffs of the second part, and W. Paice, architect, of the third part, and was as follows: "Whereas, in con-

(1) See the pleadings, 18 C. B. (N.S.) 785.

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sideration of the sum of 440*l.*, the plaintiffs, their heirs, &c., agree and covenant on their part to execute the necessary works in erecting and completing a dwelling-house, &c., according to drawings, specification, and conditions of contract, and under and to the satisfaction of the said W. Paice, the said defendant, or his executors, &c., agree and covenant on his and their part to pay unto the plaintiffs the above-mentioned sum of 440*l.* according to the terms set forth in the said conditions of contract; and lastly the said W. Paice on his part agrees to inspect and superintend the works while in progress, also to furnish detail drawings, certify the payment of advances and to the actual completion of the works according to the conditions of contract."

The drawings, specification, and conditions of contract referred to in the agreement were annexed to and were to be taken as part of the case.

The evidence given on the part of the plaintiffs at the trial was to the following effect:—Paice, the architect, applied to Scrivener, one of the plaintiffs, for a tender for the building of the villa, and afterwards delivered to him a "bill of quantities."

A bill of quantities for work to be done in erecting a building professes to be a correct list of the quantities of work and materials required to be done and provided in the erection thereof. It was essential that the plaintiffs, or some one for them, should take out a correct bill of quantities, in order that they might know for what sum to tender.

Relying upon the accuracy of the bill of quantities, of which they were assured by Paice, the plaintiffs sent in a tender offering to erect the villa for 411*l.*, which sum was afterwards increased by additions to the work specified.

Upon the completion of the building, the plaintiffs found that the bill of quantities so taken out by Paice was incorrect in many particulars, and that it had cost them 155*l.* more than they had been paid, including the money paid into court.

The defendant never in any way interfered during the progress of the work, except to choose the patterns of certain paper-hangings. All the orders were received by the plaintiffs from the architect.

The plaintiff Scrivener stated on his cross-examination that he could in a great length of time and with a great quantity of cal-

culation ascertain from drawings which contain the dimensions of a house the quantity of bricks and other materials that would be required in the building thereof. He further stated that he paid Paice for taking out the quantities, and included the sum in the amount of his tender.

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One Lansdowne, who was called for the plaintiffs, stated that he had been in practice for many years as a surveyor, and was accustomed to take out quantities; that this was almost a business of itself; that he had seen the bill of quantities in this case; that it would take four or five days to take out the quantities from the drawings and specification; that a surveyor sometimes takes out the quantities for the building-owner and sometimes for the builder; that he had been sometimes so employed by the one and sometimes by the other; that in all cases the quantities are taken out from drawings and specifications; that the builders or somebody employed by them could get out the quantities from the drawings and specification in question; and that, whoever employs the surveyor to take out the quantities, whether the building-owner or the builder, the money for so doing goes through the hands of the builder, and he includes it in the contract price.

On the part of the defendant it was submitted that there was no evidence to go to the jury on either count, and that the plaintiffs were bound by the contract, and could not recover for the work done more than the sum agreed.

The learned judge ruled that the plaintiffs were bound by their contract, and that there was no evidence to go to the jury on either count to shew that Paice, the architect, was the defendant's agent to take out the quantities, or that the defendant guaranteed and promised the plaintiffs that the bill of quantities was accurate; and he directed a nonsuit to be entered, reserving leave to the plaintiffs to move to enter a verdict for such sum as an arbitrator might award to be due, if the Court should be of opinion that there was any evidence of the defendant's liability to the plaintiffs beyond the sum paid.

A rule was moved for accordingly, in Easter Term, 1865, and refused.

The question for the opinion of the court of error was, whether there was any evidence for the consideration of the jury of the

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defendant's liability to the plaintiffs beyond the sums so paid, on either count of the declaration. If there was, the verdict was to be entered for the plaintiffs for such sum as an arbitrator might direct.

The appeal was argued in the Exchequer Chamber before Pollock, C.B., Channell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

Denman, Q.C. (*Prentice* with him), for the plaintiffs. The only question is, whether there was any evidence to go to the jury in favour of the plaintiffs' claim. The decision of the Court below was that the mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the building-owner responsible for the accuracy of the bill of quantities furnished to the builder by the architect. That decision was very much influenced by a case of *Sherren* v. *Harrison*, cited from *The Builder*. That case, however, is very loosely reported, and differs very materially from the present. It did not appear there that the architect was employed by the defendant to take out the quantities. Here, the bill of quantities had already been taken out by Paice before the contract was entered into; and it was only upon his assurance that the quantities so taken out were correct that the plaintiffs agreed to enter into it.

[POLLOCK, C.B. Who is the party to pay for taking out the quantities?]

The builder, in the first instance, pays the surveyor who does the work, and charges it in his tender. But the mere payment does not make the surveyor the builder's agent.

[MELLOR, J. It is for the builder's benefit that the quantities are taken out. He cannot tender until he knows what they are. The difficulty is, to shew that Paice was Pask's agent for this purpose.]

Paice was not employed by the plaintiffs; and the facts shew that he was acting throughout as the defendant's agent. The defendant, therefore, is bound by his representations.

[BLACKBURN, J. No doubt there may be a warranty of the correctness of the quantities. But, what evidence of it is there here?]

The representation of Paice at the time he applied to the plaintiffs for a tender amounted to a warranty.

[BLACKBURN, J. To entitle the plaintiffs to recover, they must make out three things,—that Paice was the defendant's agent, that Paice was guilty of fraud or misrepresentation, and that the defendant knew of and sanctioned it. There is no evidence here of either of these things. If there has been misconduct on the part of Paice, the plaintiffs have their remedy against him.

POLLOCK, C.B. Suppose the quantities had been too large, what would have been the result?]

The defendant would in that case have had a remedy against the person whom he employed, for any injury he might have sustained through his negligence.

Montagu Chambers, Q.C. (*Clare* with him), for the defendant, was not called upon.

POLLOCK, C.B. We are all of opinion that the judgment of the Court below was correct, and must be affirmed.

Judgment affirmed.

Attorney for plaintiffs: *A. S. Edmunds.*
Attorney for defendant: *E. Burrell.*

WORRAL WATERWORKS COMPANY *v.* LLOYD. *June* 20.

Execution—Elegit—Local Board of Health—Land held for Public Purposes.

Land which had been conveyed to a local board of health, for the purposes of the Public Health Acts, was used as a reservoir for the supply of water to the district of the local board. A judgment having been obtained against the local board in the name of their clerk:—

Held, that the land was liable to be taken under a writ of elegit.

THIS was an action of ejectment tried before Mellor, J., at the last Liverpool spring assizes. The plaintiffs claimed as tenants by elegit. It appeared that the plaintiffs had recovered a judgment against the defendant, as clerk to the Tranmere local board of health, for 932*l.* 19*s.* 2*d.* debt and costs in an action on an award. They issued a writ of elegit, to which there was a return that the

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defendant was possessed as such clerk of certain goods, and also of the water mains and pipes, and other appliances connected therewith, placed in and upon certain streets within the township of Tranmere; and also that he was seised of certain land, within the township of Tranmere, with the appurtenances, part being a reservoir which was used for the supply of water to the township. The conveyance of the land to the local board was put in, by which the property was conveyed to the local board "to have and to hold to the use of the local board, their successors and assigns, for ever, for the purposes of the Public Health Act, 1848, and the Local Government Act, 1858, incorporated therewith, according to the true intent and meaning of the said acts respectively."

A verdict was entered for the plaintiffs, with leave to move to enter the verdict for the defendant, or a nonsuit, on the ground that land conveyed to a local board of health for the purposes of the Public Health Act and Local Government Act, cannot be taken by an elegit on a judgment against the local board.

Mellish, Q.C., having obtained a rule pursuant to the leave reserved,

Edward James, Q.C., *Manisty, Q.C.*, and *Baylis*, appeared to shew cause against the rule, and relied on *Mersey Docks Trustees* v. *Gibbs* (1) They were stopped by the Court.

Crompton Hutton, and *Watkin Williams* (*Mellish, Q.C.*, with them), in support of the rule. The case of *Mersey Docks Trustees* v. *Gibbs* (1) only decides that the plaintiffs were entitled to judgment. It does not follow that they were entitled to take in execution land which was held for public purposes. The only case in which execution against such property has been upheld is *Saunders* v. *Slack* (2); and the case of *Attorney General* v. *Wilkinson* (3) is a

(1) Law Rep. 1 H. L. 93.

(2) 11 L.T. (N.S.) 484. This was a rule to set aside a fi. fa. issued by the surviving plaintiff upon a judgment obtained in *Bush and another* v. *Martin* (2 H. &. C. 311, 33 L.J. (Ex.) 17), Slack having succeeded Martin as clerk to the Bradford Paving Commissioners. Fire-engines and other goods the property of the commissioners had been seized under the writ. The Court of Exchequer discharged the rule without expressing any opinion as to whether the execution was valid or not, in order to give the commissioners an opportunity of bringing an action, and so taking the question to a court of error.

(3) 29 L. J. (Ch.) 41.

decision distinctly in point that such an execution cannot be levied.

WILLES, J. I am of opinion that this rule should be discharged. We have been anticipated by the case in the Exchequer, *Saunders* v. *Slack* (1), and by the decision of the House of Lords, in the case of *Mersey Docks Trustees* v. *Gibbs*. (2) It has been said that the House of Lords only referred to the right of the plaintiffs to judgment, and not to execution; but the principle upon which their decision rests is equally applicable to the right to execution as to judgment, and it was so understood in *Coe* v. *Wise*. (3) Blackburn, J., in delivering the opinion of the judges to the House of Lords (4), did not overlook the difficulty of public property being taken in execution for what is called a private debt, and he met it by denying that the trustees were trustees for the public any more than the debt was a public debt. In this very case the local board have been put in the place of a private waterworks company, and what reason is there that they should not be liable for their debts as much as the private company would have been?

There is nothing express in the acts of parliament to restrain the effect of the judgment; and if it be said that it is contrary to public policy for execution to issue, the decision in *Mersey Docks Trustees* v. *Gibbs* (2) is directly in point to shew that it is not. The case of *Attorney General* v. *Wilkinson* (5), before the Lords Justices, was a very peculiar case; there, there was an express prohibition against retrospective rates, and, moreover, the Court only continued the injunction against the levy till the hearing of the case, which in fact never took place.

MONTAGUE SMITH, J. I am of the same opinion. The decisions in *Mersey Docks Trustees* v. *Gibbs* (2) and *Coe* v. *Wise* (3) are conclusive, and the law laid down by them is consonant to reason and common sense.

Rule discharged.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*
Attorneys for defendant: *Field, Roscoe, & Co.*

(1) See ante, p. 720, n 2.
(2) Law Rep. 1 H. L. 93.
(3) Law Rep. 1 Q. B. 711.
(4) Law Rep. 1 H. L. at p. 111.
(5) 29 L. J. (Ch.) 41.

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May 28.

WILDES *v.* RUSSELL.

Officer—Clerk of the Peace, Removal of, for "misdemeaning himself in his office," within the 1 *W. & M. c.* 21, *s.* 6—*Interest in the Justices sitting upon the Inquiry at Quarter Sessions.*

A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, and upon a mandamus unsuccessfully resisted his claim, and thereby incurred costs, for the payment of which the quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the Court and certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the Court, and also because he thought the costs were not such as ought properly to be charged upon the county-rate, but should have been paid by the justices who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. The quarter sessions thereupon referred it to the finance committee, to consider and report what ought to be done under the circumstances; and upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, under the 1 W. & M. c. 21, s. 6, of having "misdemeaned himself in the execution of his office." The matter was heard before the justices at the next court of quarter sessions, and they unanimously found that the clerk of the peace had been guilty of the offence charged against him, and adjudged him to be dismissed from his office, and appointed the defendant to succeed him. In an action by the clerk of the peace, for money had and received, to try the defendant's right to the fees of the office:—

Held, that the justices in quarter sessions, being a competent tribunal to hear and determine the charge, and having determined it, this Court could not question the propriety of their decision; and that no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter.

THIS was an action for money had and received, to recover certain salary and fees to which the plaintiff claimed to be entitled as clerk of the peace for the county of Kent.

The cause came on for trial before Erle, C.J., at the sittings in London after last Hilary Term, when a statement was made by the plaintiff's counsel to the following effect:—

Mr. Wildes had for many years filled the office of clerk of the peace for the county of Kent. A resolution had been come to by the magistrates that his services should be remunerated by a salary (600*l.* a year) instead of fees. Conceiving that this resolution did not apply to certain fees which were called "transport fees," Mr.

Wildes persisted in receiving these in addition to the salary. The magistrates, thinking otherwise, stopped a portion of his salary to repay the amount which in their opinion Mr. Wildes had improperly received. The latter thereupon applied to the Court of Queen's Bench for a mandamus, and that Court held that he was entitled to be paid. The magistrates resisted the order of the Court; and ultimately the matter was compromised.

In the course of these proceedings a bill of costs was incurred to Mr. Scudamore, the solicitor employed by the magistrates to defend them against the mandamus; and, upon Mr. Scudamore's bill being presented to the court of quarter sessions held in December, 1864, Mr. Wildes, in the supposed exercise of his duty as clerk of the peace, submitted to the Court that the amount was not properly chargeable to the county-rate; and on the 24th of January, 1865, he addressed the following letter to the Earl of Romney, the chairman of the quarter sessions:—

"Maidstone, January 24th, 1865.

"My Lord,—Amongst the miscellaneous bills recommended for payment in the report of the finance committee to the last court of general sessions, is a bill of Mr. Scudamore, of 169*l.* 16*s.* 6*d.* That bill was not presented to the Court in the usual manner, for the approval of the Court; but I find only a short note of the purport of the bill, signed by Mr. Scudamore, and mentioning that the particulars had been delivered to the finance committee, and approved by them. With reference to what has appeared in previous reports of the finance committee, and the discussions which have occurred, I must necessarily infer that a considerable portion of the amount of this bill has arisen from measures adopted by the finance committee without any legal authority, and in opposition to the letter and spirit of the act of parliament by which the charges upon the county-rate are regulated and restricted. (1) I have therefore considered it my duty not to enter in the proceedings of the Court an order for the payment of this bill, but to report to the next court of general sessions on the subject.

"J. H. Wildes."

Lord Romney having handed this letter to Mr. Scudamore, the latter wrote to Mr. Wildes,—"Lord Romney has handed me your

(1) 4 & 5 Wm. 4, c. 47: re-enacted by 15 & 16 Vict. c. 81.

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letter of the 24th instant; and in reply I beg to state that my bill (or short note, as you call it,) having been specially brought under the notice of the Court and signed by the justices present in the usual way, the order for payment was regularly made; and I am directed by his Lordship to require that it may be recorded." To this Mr. Wildes replied,—"For the reasons stated in my letter to the Earl of Romney of the 24th instant, I consider I should be acting contrary to my duty in recording the order alluded to, and must therefore decline to do so, but to report to the Court on the subject."

At the ensuing quarter sessions, held on the 13th of March, 1865, Mr. Wildes submitted to the Court the following statement:—

"My letter to the Earl of Romney of the 24th of January states shortly the difficulty which occurred to me with respect to the order of the last Court for payment of the amount of the bill of the county solicitor. The short note of the bill which was presented by the finance committee to the Court, and for payment of which the order was made, is in the following language:—'Professional services rendered and money paid on account of the general business of the county from 23rd November, 1863, to 2nd December, 1864, the particulars of which have been delivered to the finance committee, and approved by them,—169*l.* 16*s.* 6*d.*'

"I beg now to state to the Court fully and explicitly the grounds upon which I consider the Court had no power to make the order in question, and that I should have been acting contrary to my duty if I had treated that as a valid order, and given my certificate to the county treasurer as his sanction for the payment of the amount as a legal charge against the county-rate.

"In the first place, I have to observe that this is the first instance in which this Court has been called upon to pay any sum of money, without a legal bill or account having been produced and laid before the Court. I apprehend it is clear that every person liable to the payment of the county-rates has a right to investigate the treasurer's accounts, to inspect all the orders of the Court, and to examine all bills and accounts with the payment of which the county-rates are charged, and to appeal against any order of this Court or any item of payment in the treasurer's accounts, on the

ground of any illegality. The practice has hitherto invariably been, for the clerk of the peace to have the custody of all bills and accounts ordered to be paid, and for him to supply the treasurer with certificates of those orders as his authority for their payment. Were this practice to be discontinued, and the bills and accounts not produced to the Court, but retained by any of the justices in their own possession, the rate-payers would be precluded from having the usual and proper means of access to these bills and accounts.

"With reference, however, to this subject, another question arises of very great importance as affecting the legality of the proceedings of this Court and the interest of the inhabitants of the county liable to the payment of the county-rates. I beg to call the attention of the Court, as I have recently done on two previous occasions, to the act of parliament by which the courts of general and quarter sessions of counties with reference to the expenditure of the county-rate are governed and restrained, which contains the following enactment: (1)—'All business appertaining to the assessment, application, or management of the county-stock or rate, or of any fund or funds used or applied in aid thereof or contributory thereto, or to any matter or things whereby or in respect whereof the said county-stock or rate is or may be chargeable by law, which by any statute or statutes now in force the justices of the peace for that part of Great Britain called England are authorized and directed to do and transact at the general or quarter sessions, or at any adjournment thereof, shall be done and transacted publicly and in open court at such general or quarter sessions, or adjournment thereof, and not otherwise; and that no order of such justices relating to the matters aforesaid shall be binding or effectual unless the said order shall have been made and the business relating thereto shall have been done and transacted publicly and in open court as aforesaid;' and (s. 49) that public notice shall be given of the day and hour on which any such business shall be commenced.

"From what occurred on the occasions to which I have alluded, it must naturally be inferred that the costs and expenses comprised in the bill in question apply to matters and things not 'done and

(1) 15 & 16 Vict. c. 81, s. 48.

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transacted publicly and in open court,' but which, on the contrary, have been transacted privately by and under the direction of the finance committee; and which transactions the committee have avowedly intentionally withheld from the knowledge of this Court and from the public.

"If the bill in question applied only to matters which the Court can legally make an order for payment of, still it was necessary that the bill should be produced to the Court, and the order for its payment made publicly and in open Court. If, however, the charges and payments comprised in the bill relate to transactions not done by orders of this Court made publicly and in open Court, but otherwise, it is clear that, under the express terms of the act of parliament, all such transactions are illegal, and any order of this Court for payment of charges and expenses incurred by reason of such transactions cannot be 'binding and effectual.'

"For these reasons, I consider that, in my capacity of clerk of the peace, as a responsible public officer, and a component part of the Court, I should be acting contrary to my duty if I were by any act or acquiescence to be instrumental in giving effect to an order so clearly illegal; and that I should be morally and indeed legally responsible for my misconduct in so acting in opposition to the clearly-defined terms of an act of parliament passed for the express purpose of prohibiting such practices and such orders being made. I therefore submit to the Court that I have taken the only course which I could legally and with propriety have adopted, in treating this order as illegal and void, and in bringing before this Court for its serious consideration a subject of so much importance as affecting the propriety and legality of the proceedings of this Court, the powers assumed and exercised by the finance committee, and the due and legal appropriation of the county-rates."

The following resolution was thereupon passed by the justices:—

"General Sessions, 13th March, 1865.

"The chairman of this Court read a letter he had received from the clerk of the peace, declining to record an order of the last Court for payment of the sum of 169*l.* 16*s.* 6*d.* to Mr. Scudamore for professional services of which a detailed account had been furnished to the finance committee:

"Read also a letter written by Mr. Scudamore, by direction of

the chairman, requiring the clerk of the peace to record the order, and a letter from the clerk of the peace refusing to do so; also the report of the clerk of the peace explanatory of his reasons for declining to enter the order, as being in his opinion illegal:

"It is ordered by this Court that it be referred to the finance committee to take such measures as they shall think right in respect to the refusal by the clerk of the peace to enter in the proceedings of the Court an order made by the last Court, for payment of the said bill; and that the said report of the clerk of the peace be handed by him to the finance committee."

The finance committee caused a complaint to be prepared in the name of the treasurer of the county against Mr. Wildes, and reported to the next court of quarter sessions that they had done so, when the following resolution was passed:—"This Court approves of the measures adopted by the finance committee, and directs them to proceed further in the matter."

The complaint, which purported to be founded upon the 1 W. & M. c. 21, s. 6, alleged amongst other things, that, at the quarter sessions assembled, &c., "it was duly and lawfully ordered that a sum of 169*l.* 16*s.* 6*d.* then due and payable out of the rates of the said county to one F. Scudamore for professional services rendered as an attorney-at-law and solicitor and money paid on account of the general business of the said county, should be paid to the said F. Scudamore by the said L. D. Wigan, the treasurer of the said county; that it then became the duty of the said H. A. Wildes, as such clerk of the peace as aforesaid, to enter and record such order; and that he unlawfully, wrongfully, wilfully, maliciously, and contumaciously, and in disobedience of his duty, and without lawful excuse, and actuated by improper motives, refused to enter and record the said order," &c.

Counsel appeared before the quarter sessions in support of the complaint; and that Court came to the conclusion that Mr. Wildes had been guilty of a misdemeanour in having contumaciously refused to record the order for the payment of Mr. Scudamore's bill, and adjudged him to be dismissed from his office of clerk of the peace.

The office being thus vacant, the lord lieutenant of the county appointed Mr. Russell, the defendant, to be Mr. Wildes's successor.

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Mr. Wildes then applied to the Court of Queen's Bench for a certiorari, which was refused; but Crompton, J., threw out a suggestion that possibly the better course would be to raise all the points by bringing an action for money had and received against his successor in office.

Upon this statement of facts, it was contended on the part of the plaintiff that he had not been guilty of a misdemeanour within the meaning of the statute; that the justices before whom the complaint was heard and who were parties to the decision, or some of them, were interested either pecuniarily on the ground that they were personally liable for Mr. Scudamore's bill, or as parties to the prosecution, and therefore that the tribunal was not properly or legally constituted, and their judgment was consequently null and void.

On the part of the defendant it was submitted that the judgment of the court of quarter sessions in a case where that Court had jurisdiction under the statute to hear and determine the question could not be reviewed by a jury; and that, if there were any excess or want of jurisdiction, the proper remedy was to bring up the order to the Court of Queen's Bench and quash it; but that, so long as it stood, it was binding and conclusive.

The Lord Chief Justice ruled that, assuming the plaintiff's counsel to be prepared to prove all he had stated in his opening, it was not competent to him to impeach the validity of the order of quarter sessions in this action: and he thereupon directed a nonsuit to be entered.

Montagu Chambers, Q.C., in Easter Term last, obtained a rule nisi for a new trial, on the ground that the plaintiff was entitled in this action to sue for and recover from the defendant the fees pertaining to the office of clerk of the peace of the county of Kent, as the lawful holder of that office at the time when they were received by the defendant; that the plaintiff was not lawfully dismissed from the office of clerk of the peace, nor the defendant lawfully appointed thereto or entitled to take the fees thereof; that the order or adjudication of justices or the quarter sessions purporting to dismiss the plaintiff from his office of clerk of the peace was

illegal and void; that the court of quarter sessions, by whom such order or adjudication was made or purported to be made, was improperly and illegally constituted, the justices or some of them who were present or taking part in the proceedings being incompetent or disqualified, through personal or pecuniary interest, or as accusers, prosecutors, parties, or otherwise interested in the result; that all the proceedings, or some of them, against the plaintiff for the purpose of removing him from his office were unlawful and void; that the alleged misconduct of the plaintiff did not constitute a misdemeanour in the execution of his office, within the provisions of the statute 1 W. & M. c. 21, s. 6, and the justices at quarter sessions had no jurisdiction to examine, consider, or adjudicate thereon; that no sufficient complaint or charge in writing was duly or lawfully exhibited against the plaintiff to the justices of the peace in their general quarter sessions, or in compliance with the provisions of the said statute, and that the information or complaint upon which the justices assumed to proceed was merely colourable; that the plaintiff did not misdemean himself in the execution of his office, within the meaning of the statute, nor was he guilty or proved to be guilty upon examination openly in the court of general quarter sessions of the charges or offences, or any of them, made against him; and that the order or adjudication purporting to discharge the plaintiff from his office of clerk of the peace was not fairly or lawfully obtained.

Bovill, Q.C., and *C. Pollock*, shewed cause. The statute constitutes the court of quarter sessions the tribunal to try and conclusively to determine whether or not the clerk of the peace has been guilty of a misdemeanour such as to justify his removal from the office; and, that Court having decided upon complaint in writing properly laid before them, it is not competent to this Court to inquire into the grounds upon which their decision was based. The Court of Queen's Bench has already declined to interfere. It may be conceded that, if the proceedings shewed upon the face of them an absence of jurisdiction, they would be null and void. But here it is sought to impeach a judgment of a competent tribunal, which is good upon the face of it, and to try before a jury, upon different evidence, the truth of the charges upon which that judgment was founded. The cases upon the subject are numerous and nearly

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uniform. In *Rex* v. *Grunden* (1), a sentence of expulsion of a fellow-commoner of Queen's College, Cambridge, unappealed from, was held conclusive; *Reg.* v. *Bolton* (2), an order of justices under the 59 Geo. 3, c. 12, ss. 24, 25; *Re Clarke* (3), an order of the Master of the Rolls for contempt in not putting in an answer; *Carus Wilson's* case (4), an order of commitment for contempt of the Royal Court at Jersey.

[ERLE, C.J., referred to *Kemp* v. *Neville* (5), where it was held that a judicial officer,—the Vice-Chancellor of the University of Cambridge,—is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction; and that a matter so adjudicated by him cannot be put in issue in an action against him.]

That a wilful and contumacious refusal by an officer to perform his duty works a forfeiture of the office, there are abundant authorities to shew. In Bac. Abr. (6) it is said: "It is laid down in general, that, if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, in these cases the office is forfeited." So, in *Philips* v. *Bury* (7), it was held that contumacy is a good cause of deposition of an officer. In *Rex v. Lloyd* (8) it was held that, on removal of the clerk of the peace, the evidence need not be set out in the order. In *Rex* v. *Corporation of Wells* (9), speaking of the right of amotion of a recorder, for neglect or refusal to perform his duty, Lord Mansfield says: "A general neglect or refusal to attend the duty of such an office, is a reason of forfeiture; a *determined* neglect, a *wilful* refusal." Here there was a wilful neglect by Mr. Wildes of his duty as clerk of the peace; a contumacious and persistent refusal to perform it. It avails not here to say that his refusal to enter the order of the sessions was bonâ fide, by reason of a supposed irregularity in the order. This Court cannot enter into that question: the justices have determined it. In *Rex* v. *Aire and Calder Navigation* (10), it was held that the Court

(1) Cowp. 315.
(2) 1 Q. B. 66.
(3) 2 Q. B. 619.
(4) 7 Q. B. 984, 1015.
(5) 10 C. B. (N.S.) 523; 31 L. J. (C.P.) 158.
(6) Offices and Officers (M).
(7) 1 Ld. Raym. 5; Comb. 265; Holt, 715; 1 Show. 360; 4 Mod. 106; Skinn. 447.
(8) 2 Stra. 996.
(9) 4 Burr. 1999, 2004.
(10) 2 T. R. 660.

of Queen's Bench will not interfere with the decision of the justices at sessions, upon the ground of an alleged inequality in a poor-rate, unless the inequality be manifestly apparent on the rate: and Buller, J., said: "The distinction between orders of justices and special verdicts has long been established: in the latter, where it concludes generally, the whole case must appear upon record; but the very reverse is the rule which obtains in the case of orders of justices, for the Court will intend everything to be right which does not appear to be otherwise, and they will not entertain any doubt upon a subject upon which the justices did not." In *Reg.* v. *Dean and Chapter of Rochester* (1), the dean and chapter having removed a schoolmaster, a mandamus was applied for to compel them to restore him: and the Court held that the prosecutor should have proceeded by appeal to the visitor, the Bishop of Rochester; and that, assuming the dismissal to have been improper, the Court of Queen's Bench were not authorized to interfere on the alleged ground that the dean and chapter were acting in excess of their jurisdiction.

[BYLES, J. Can the parties who make the charge sit as judges to hear and determine it?]

The fact of some of the justices present when the matter was heard being members of the committee at whose instance the charge was preferred, cannot affect the validity of the proceeding. In every case of commitment for contempt, the tribunal ordering the commitment is in some sense deciding in its own case: see the observations of Lord Denman in *Carus Wilson's* case (2), and the cases collected in *Ex parte Fernandez.* (3) In *Ex parte Pettitmangin* (4), a certiorari was moved for to bring up a commitment by two justices of the borough of Liverpool, convicting P. for suffering prostitutes to remain on his premises, on the ground that one of the justices was a member of the watch committee of the town-council, and that the information was laid by an inspector of the police in pursuance of instructions from the committee; and the rule was refused. Then, as to the alleged interest in the justices. It is said that the justices who took part in the proceedings against Mr. Wildes,

(1) 17 Q. B. 1.
(2) 7 Q. B. at p. 1015.
(3) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(4) 33 L. J. (M.C.) at p. 99, note 3.

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or some of them, were interested. In the first place, it is said that they had a direct pecuniary interest, inasmuch as the costs in respect of which the order which Mr. Wildes was charged with disobeying were not properly payable out of the county fund, but were due from those who directed the proceedings in which those costs were incurred. That the justices were warranted in ordering payment of Mr. Scudamore's bill out of the county-rates, is clear from *Rex* v. *Inhabitants of Essex.* (1) Lord Loughborough, when going the Home Circuit in 1789, imposed a fine upon the county of Essex (under 12 Geo. 2, c. 29, s. 6) for neglecting to repair the county gaol. The justices, thinking the imposition of the fine illegal, took steps to resist it; and it was held that they might properly order the costs of that litigation to be paid out of the county stock. "Wherever," said Lord Kenyon, "a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence of the county purse, have necessarily a right to defray such expenses out of the county stock." So, in *Reg.* v. *Town Council of Lichfield* (2), where a town council had removed a town-clerk from his office, by resolution, for misconduct, and refused his claim of compensation, it was held that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund, under the 5 & 6 Wm. 4, c. 76, s. 192, although the jury found the issues ultimately raised on the mandamus for the late town-clerk,—it not being shewn that the town council acted otherwise than bonâ fide in the removal. That interest in the judge is not a ground for holding his decree void, is clear from *Dimes* v. *Grand Junction Canal Company* (3) and *Ranger* v. *Great Western Railway Company.* (4)

Montagu Chambers, Q.C., and *Gates*, in support of the rule. To warrant the dismissal of the clerk of the peace, he must be shewn clearly to have been guilty of a misdemeanour in his office: *Rex et Reg.* v. *Evans* (5); a mere accidental neglect will not suffice; and there must be a formal complaint in writing: 1 W. & M. c. 21, s. 6. The matter must also be tried before a legally con-

(1) 4 T. R. 591.
(2) 10 Q. B. 534.
(3) 3 H. L. 759.
(4) 5 H. L. 72.
(5) 4 Mod. 31; Holt, 188; 1 Show. 282; 12 Mod. 13.

stituted tribunal. If Mr. Wildes thought that the justices were about to make an order which the law did not sanction, it was his duty as clerk of the peace to remonstrate, and his remonstrance could not be construed into a misdemeanour. Some at least of the justices who sat upon the investigation of the complaint at the quarter sessions were interested as being the persons out of whose pockets Mr. Scudamore's bill would have to be paid if not paid out of the county-rates: and they were further interested as promoters or as witnesses in the prosecution. It is a fundamental principle of law that no person can be a judge in his own cause: Bac. Abr. (1) "The Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by charter was sole judge of the Court:" per Holt, C.J. (2) In Broom's Maxims it is said (3): "It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested: 'Nemo sibi esse judex vel suis jus dicere debet.'" "The leading case in illustration of this maxim is *Dimes* v. *Grand Junction Canal Company* (4), where the facts were as under:—The canal company filed a bill in equity against a landowner in a matter touching their interest as copyholders in certain land. The suit was heard before the Vice-Chancellor, who granted the relief sought by the company; and the Lord Chancellor (Lord Cottenham), who was a shareholder in the company,—this fact being unknown to the defendant in the suit,—affirmed the order of the Vice-Chancellor. It was held, on appeal to the House of Lords, that the decree of the Lord Chancellor was under the circumstances voidable, and ought to be reversed: Lord Campbell, C., observing: 'It is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. . . . We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in the cause took part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high Court of last resort, in a case in which the Lord

(1) Courts (B).
(2) Anon. 1 Salk. 396.
(3) 4th ed. 118.
(4) 3 H. L. 759.

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Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.'" The same doctrine is affirmed in *Ranger* v. *Great Western Railway Company*. (1) It has been invariably laid down, that, however regular the proceedings may appear to be upon the face of them, they may be impeached if it can be shewn that there has been any fraud, or that the judge or magistrates presiding or taking any part in them have any interest in the result: *Brookes* v. *Earl Rivers* (2); *Wood* v. *Mayor of London* (3); *Day* v. *Savadge* (4); *Rex* v. *Bishop of Chester* (5); *Briscoe* v. *Stephens* (6); *Allen* v. *Dundas* (7); *Doe* v. *Haddon* (8); *Basten* v. *Carew* (9); *Day* v. *King* (10); *Christie* v. *Unwin* (11); *Thompson* v. *Blackhurst* (12); *Reg.* v. *Bolton* (13); *Reg.* v. *Cheltenham Paving Commissioners* (14); *Reg.* v. *Justices of Hertfordshire* (15); *Reg.* v. *Upton St. Leonards* (16); *Reg.* v. *Stocks* (17); per Wightman, J., in *Rex* v. *Justices of Suffolk* (18); *Reg.* v. *Allan* (19); *Reg.* v. *Rand*. (20) And see the notes to *Crepps* v. *Durden*. (21) In *Reg.* v. *Owen* (22), it was held that a county court clerk removed for inability or misbehaviour might question the validity of such removal by information in the nature of a quo warranto against his successor. The authorities as to foreign judgments are referred to by Taunton, J., in *Thompson* v. *Blackhurst* (23), and amongst others he cites *Walker* v. *Witter* (24),

(1) 5 H. L. 72.
(2) Hardr. 503.
(3) 1 Salk. 397; Holt, 396.
(4) Hob. 85, 87.
(5) 2 Stra. 797.
(6) 2 Bing. 213; 9 Moore, 413.
(7) 3 T. R. 125.
(8) 3 Doug. 310.
(9) 3 B. & C. 649.
(10) 5 Ad. & E. 359.
(11) 11 Ad. & E. 373.
(12) 1 N. & M. 266.
(13) 1 Q. B. 66.
(14) 1 Q. B. 467.
(15) 6 Q. B. 753.
(16) 10 Q. B. 827.
(17) 14 Q. B. 145.
(18) 18 Q. B. 416, 421; 21 L. J. (M.C.) 169.
(19) 33 L. J. (M.C.) 98; 4 B. & S. 915.
(20) Law Rep. 1 Q. B. 230; 35 L. J. (M.C.) 157.
(21) 1 Smith's L. C. 5th ed. 649, 650.
(22) 15 Q. B. 476; 19 L. J. (Q.B.) 490.
(23) 1 N. & M. at p. 273.
(24) 1 Dougl. 1.

where Lord Mansfield said that foreign judgments are a ground of action everywhere, *but they are examinable:* and he goes on to say,—"Lord Kenyon (who differed materially from Lord Mansfield on these points), in giving judgment in *Galbraith* v. *Neville* (1), refers to *The Duchess of Kingston's* case (2), and says that it was there held that the judgment of the Ecclesiastical Court may be impeached on the ground of fraud. If the judgment of the Ecclesiastical Court may be impeached on the ground of fraud, surely the judgment of the county court may be." Wherever it appears on the face of the foreign proceedings, *or by extrinsic proof*, that the judgment is against natural justice, as, that the defendant has never been summoned (in which case the Court would have no jurisdiction), the Courts here will not give effect to it: *Buchanan* v. *Rucker* (3); *Cavan* v. *Stewart* (4); *Vallee* v. *Dumergue* (5); *Price* v. *Dewhurst.* (6) And a judgment in the superior courts of Ireland may be impeached on the same ground: *Ferguson* v. *Mahon.* (7)

[WILLES, J. This Court held the same in *Sheehy* v. *Professional Life Assurance Society.* (8)]

WILLES, J. This is an action for money had and received, brought to try whether the plaintiff or the defendant is entitled to hold the office of clerk of the peace for the county of Kent. The question raised at the trial was, whether the removal of Mr. Wildes by the justices in quarter sessions was a valid removal. The facts were in substance as follows:—The plaintiff claimed a right to certain fees, which right was contested; and the justices appear to have entertained an opinion adverse to the plaintiff's claim, and stopped a portion of his salary, whereupon the plaintiff applied for and obtained a mandamus to the justices of Kent ordering payment of the sum so withheld. Certain of the justices, acting for the whole, as is usual where a mandamus is directed to a large and fluctuating body, made a return to the writ, and resisted the plaintiff's demand; and they employed one Scudamore as their

(1) Cited 1 Dougl. at p. 6.
(2) 20 How. St. Tr. 355.
(3) 9 East, 192; 1 Campb. 63.
(4) 1 Stark. 525.
(5) 4 Ex. 290.
(6) 8 Simon, 279, 302.
(7) 11 Ad. & E. 179.
(8) 2 C. B. (N.S.) 211; in error, 3 C. B. (N.S.) 597.

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attorney in that litigation. The matter ended in a compromise. A bill of costs was incurred by the justices in those proceedings, and became payable to Mr. Scudamore. It is unnecessary for the decision of this case to consider whether or not Mr. Scudamore could have recovered that bill against the justices personally who made the return, or whether the employment was upon the faith of the costs being payable out of the county-rate. Suffice it to say that a bill of costs was incurred, that that bill came under the consideration of the finance committee, and that they considered that, as the proceeding was one in which the county was interested, the costs of the defence ought to be paid out of the county-rates, and recommended that the bill should be paid. The magistrates, in sessions, acting upon that recommendation, made an order accordingly. Assuming that to have been a valid order, it became the duty of Mr. Wildes, as clerk of the peace, to enter it and to give a certificate to the treasurer. He, however, resisted the order of the justices, and refused to enter it or to make out the proper document for the treasurer; and this he did upon several grounds detailed in his report to the justices,—amongst others, that the costs were incurred by individuals and not by the whole body of justices, and therefore were not properly chargeable on the county, that no bill with items had been furnished by Mr. Scudamore, but only an abstract, and that the order of the justices was not based upon proper materials. I do not find that Mr. Wildes at that time raised the point mentioned by Mr. Chambers at the outset of his argument to-day, viz. that a portion of the costs comprised in that order was incurred by reason of the contumacy of the justices in not acting upon the compromise, and therefore ought to be borne by them personally. I do not say that it would have made any difference in my opinion if he had done so; but it is worthy of remark, in passing, that he did not. He made his objection, and he adhered to it, and refused to enter the order. This being so, his refusal was referred to the finance committee; and they came to the conclusion that Mr. Wildes by his contumacious behaviour had been guilty of a misdemeanour in his office, and recommended a prosecution against him by the county treasurer, who should present to the court of quarter sessions a statement of the alleged offence. The county treasurer accordingly made out a statement of the grounds of

complaint against Mr. Wildes. The matter was brought before the quarter sessions, and they adjudged that Mr. Wildes had been guilty of misbehaviour in his office, and that he should be removed therefrom. The custos rotulorum thereupon appointed Mr. Russell to be his successor. Mr. Wildes, being dissatisfied with the decision come to by the quarter sessions, has brought this action in order to try its validity. These facts having been opened by Mr. Chambers at the trial, Mr. Bovill, for the defendant, contended that, assuming them all to be proved, they afforded no ground of action, as the judgment of the quarter sessions was conclusive and could not be inquired into by a jury. The Chief Justice assented to that argument, and nonsuited the plaintiff; and a rule nisi was obtained to set aside that nonsuit upon the various grounds which have been argued before us. That argument has given the Court the greatest assistance: and it is a source of much satisfaction to us in determining such a matter, that all the arguments and all the authorities that could be brought to bear upon it have been so fully gone into. If we had entertained any serious doubt as to the conclusion we ought to come to, we should have taken time to consider. But, as we entertain no doubt, there is no reason why our judgment should not be pronounced without delay. I am of opinion that the course pursued by the Chief Justice was right, and that the rule should be discharged. A variety of questions have been presented for decision; and I think I cannot do better than go through them in the order in which they were urged. The first to which I will advert relates to the construction to be put upon the 6th section of the 1 W. & M. c. 21, by which authority is given to the justices to dismiss the clerk of the peace. The language in which that authority is conferred is as follows:—"If any clerk of the peace shall misdemean himself in the execution of the said office, and thereupon a complaint and charge in writing of such misdemeanour shall be exhibited against him to the justices of the peace in their general quarter sessions, it shall be lawful for the said justices, or the major part of them, from time to time, upon examination and due proof thereof, openly in their said general quarter sessions, to suspend or discharge him from the said office." I am unable to entertain any doubt as to the true meaning of that section. The law upon the subject of forfeiture

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of an office is to be found in Com. Dig. Officer (K. 3), where it is laid down that an officer forfeits his whole office by non-user or abuser of the office by him or his deputy. In some such sense as this, and not merely in a criminal sense, is the word misdemeanour used in this section; and there can be no doubt, therefore, that an absolute and persistent refusal by a clerk of the peace to enter an order of sessions is a misdemeanour in his office. I entirely agree with Mr. Chambers that a mere delay in acting upon such an order, or even a strong remonstrance against it by the clerk of the peace, would not amount to a misdemeanour so as to work a forfeiture of the office. Suppose the justices were to make an order which they thought right, and the clerk of the peace, after remonstrance, refused to enter the order: for instance, if the justices pronounced sentence upon a prisoner awarding him hard labour, conceiving they had power to do so, and the clerk of the peace, being of a different opinion, though the mere secretary of the Court, refused to record the sentence, I apprehend that would clearly be a misdemeanour in his office. The proper course would be to leave it to the Court of Queen's Bench to determine whether or not the order was right, and not for the clerk of the peace to set himself up for a court of appeal. Mr. Wildes did certainly most positively and with deliberation refuse to enter the order of the quarter sessions, setting himself up as the monitor of his masters. He was therefore clearly guilty of a misdemeanour in his office. There would be an end of all subordination in the officers of a Court if such conduct were to be passed over without reprobation. It may be proper to make a single remark on the question whether or not Mr. Wildes' objection was correct. Apart from what Mr. Chambers has suggested as to a portion of the bill, I have yet to learn that costs incurred in county business are to be borne by the justices, who really represent the county. It is difficult to see any legal objection to the order. *Rex* v. *Inhabitants of Essex* (1) is abundant authority to shew that there is no such general rule as that on which Mr. Wildes relied. It is enough, however, to say that the justices had determined the question, and that the clerk of the peace refused to give effect to their decision. The next remark I would make upon s. 6 is with reference to the mode in which the

(1) 4. T. R. 591.

complaint is to be made. It provides that "thereupon a complaint and charge in writing of such misdemeanour shall be exhibited against him to the justices of the peace in their general quarter sessions." Of course this section is not dealing exclusively with cases where the clerk of the peace has acted contumaciously. That must be taken as an illustration only. It might be that the clerk of the peace had laid claim to fees to which he was not by law entitled, and it would be competent to the party grieved to proceed in this form. The section had two objects in view,—one, that the charge should be certain,—the other, that the clerk of the peace should have precise notice of what is alleged against him. There may also be cases in which the misdemeanour may affect the Court itself, as in the instance of the officer being guilty of contumacy or contempt of the Court. I cannot for a moment doubt that the 6th section of the statute is equally applicable to such a case as to that of a misdemeanour affecting a third person. How is that to be proceeded with? Who is to exhibit the complaint? Some person having an interest in doing so. I should have thought that the Court itself of its own mere motion might call upon the officer to answer. The cases of *Re Bryant* (1) afford a very good illustration. There the Court of King's Bench, acting under the statute 27 Geo. 2, c. 17, appear by a rule of court to have exercised a jurisdiction quite analogous to that conferred upon the court of quarter sessions under this statute. In the present case, the finance committee appear to have induced the treasurer of the county to exhibit the charge. I think under these circumstances it may be taken that the court of quarter sessions did request the treasurer to bring the matter before them.

I come now to the most important question in the case, that is to say, whether the Court which took upon itself to discharge Mr. Wildes from his office was a Court competent to dispose of the matter, or whether their proceeding was illegal and void either in respect of their acting as judges in their own cause or of their being judges and also parties interested. This has been divided into three points. In the first place, it was said that the justices present, or some of them, had a pecuniary interest in the subject-matter to be discussed, inasmuch as they were personally liable for Mr. Scuda-

(1) 4 T. R. 716; 5 T. R. 509.

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more's bill of costs. In the next place, it was said that there was an interest as prosecutors in those of the justices who directed the treasurer to prosecute the inquiry. And, thirdly, it was said that the decision was improperly obtained. I am unable to separate the third point from the other two. It is not suggested that any of the justices who composed the court of quarter sessions used any artifice or design to obtain the dismissal of Mr. Wildes. I find nothing in the case to induce me to come to the conclusion that any of the justices were guilty or suspected of corruption. The third point, therefore, may be considered as out of the question. As to the alleged pecuniary interest, it appears that certain of the justices had employed Mr. Scudamore to defend them against the proceedings under the mandamus. These, it is said, were interested in obtaining the order for the payment of Mr. Scudamore's bill, inasmuch as they would otherwise be personally liable for it; and so that they were interested in procuring Mr. Wildes to be discharged from his office for having refused to enter that order and make out the necessary certificate for the payment of the money by the county treasurer. I must refer to what I have already said upon this subject: and I would only add that I cannot bring myself to the conclusion that those persons had any such pecuniary interest as is suggested. Indeed, we could hardly hold that they had, without overruling *Rex* v. *Inhabitants of Essex*. (1) It may or may not have been more wise if those of the justices who had caused those costs to be incurred had abstained from being present at the investigation. But they were the best judges of the propriety of their conduct upon the occasion. That their presence was lawful, is all that we have to deal with. I have heard nothing to satisfy me that they had any such pecuniary interest as to disqualify them. As to the other point, that they were both prosecutors and judges, I cannot bring myself to feel any doubt. As well might it be said that a judge who sees an offence committed before him, and directs a bill to be sent up to the grand jury, ought to withdraw from the bench when the charge comes to be tried. I cannot regard the justices who, so to speak, took notice of the alleged contumacy, and complained of it and suggested the prosecution, as parties to the proceedings. I would here make a remark upon s. 6 of the statute

(1) 4 T. R. 591.

of W. & M. On the removal of the clerk of the peace, the custos rotulorum is to nominate and appoint another person to succeed him: but, in case of the refusal or neglect of the custos rotulorum to make such nomination and appointment before the next general quarter sessions to be held after such refusal or neglect, the appointment is vested in the justices at quarter sessions. *All* the justices, therefore, may in some sense be said to be interested in the removal of the clerk of the peace. The remote interest here surmised creates at the most a sort of bias, but is not to be compared with the positive interest I have referred to. Assuming, however, that the justices or some of them were disqualified by reason of interest, what would be the result? Would it be that the whole proceedings were void? or would it be for the Court of Queen's Bench, in the exercise of its prerogative jurisdiction over all inferior tribunals, to interpose in order to prevent injustice being done? *Dimes* v. *Grand Junction Canal Company* (1) may be referred to, for the purpose of shewing that a judgment is not void by reason of interest in the judge, but voidable only by proper proceedings taken to set it aside. Nothing can be stronger than the opinion of the judges delivered by Lord Wensleydale, in which he points out the proper course to be pursued in such a case. "If," he says, "this had been a proceeding in an inferior court, one to which a prohibition might go from a court in Westminster Hall, such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding judge of the court was interested in the suit. Whether a prohibition could go to the Court of Chancery, it is unnecessary to consider. If no prohibition should be applied for, and in cases where it could not be granted, the proper mode of taking the objection to the interest of the judge would be, in courts of common law, by bringing a writ of error for error in fact, and assigning that interest as cause of error." Until a judgment is reversed by a competent tribunal, it must be assumed to be valid. What is the effect of assuming this to be a valid judgment? As to that, it is unnecessary to refer to more than one authority, viz. to the judgment of this Court in *Kemp* v. *Neville* (2), where

(1) 3 H. L. 759: and see *Ranger* v. *Great Western Railway Company*, 5 H. L. 72.

(2) 10 C. B. (N.S.) 523; 31 L. J. (C.P.) 158.

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the Chief Justice adopts the opinion of Lord Holt in *Groenvelt* v. *Burwell.* (1) There, the declaration was for false imprisonment. The justification shewed that a charter of Henry 8, confirmed by statute, invested the censors of the College of Physicians with authority to supervise all physicians practising medicine in London, and to punish them for bad practice, by fine and imprisonment; that the defendant used the faculty of medicine in London, and attended a patient, and treated her unskilfully; that a complaint was made to the censors, who inquired into it, and heard witnesses and the plaintiff, and adjudged him guilty of bad practice, and sentenced him to imprisonment. The plaintiff argued that the plea was bad, because it did not shew sufficient jurisdiction in the censors. But Holt, C. J., in delivering the judgment of the Court, decided that the censors had a sufficient jurisdiction,—first, over the person of the plaintiff, because he had practised in London, —secondly, over the subject-matter, viz. the unskilful administration of physic,—thirdly, over the fact for which he was punished, because it was committed within the jurisdiction, viz. in London. And he goes on to say, that, "where a man has jurisdiction over another man in all these particulars, it is apparent that, whether the matter of fact be such as is alleged or not, it is not traversable, but the plaintiff is concluded." Such is the law laid down by Lord Holt, and adopted by this Court. A vast variety of cases have been cited for the purpose of establishing that that is not the rule of law which should be applied to the present case. I do not propose to refer to more than two of them, viz. *Price* v. *Dewhurst* (2) and *Doe* v. *Haddon.* (3) The former of these cases appears at first sight to be an authority, not for entering into an inquiry into the proceedings before the justices, but for inquiring whether the Court was properly constituted, and to shew a distinction between the present case as to the circumstances and *Dimes* v. *Grand Junction Canal Company* (4) and the other cases cited on the part of the defendant. But *Price* v. *Dewhurst* (2), when examined carefully, will be found not to sustain any such distinction. The circumstances were very peculiar. It appeared that, in

(1) 1 Ld. Raym. 213, 454; 1 Salk. 200, 396; 3 Salk. 354; 12 Mod. 386; Holt, 184, 395; Carth. 491.

(2) 8 Simon, 279.

(3) 3 Doug. 310.

(4) 3 H. L. 759.

and before 1805, one Seaton and his wife, who were British-born subjects, were domiciled and naturalized in the Danish island of St. Croix. In 1805, they came to England, and were domiciled there at their deaths. In 1807, they made a joint will, by which they bequeathed a sum belonging to them jointly, and which was invested on a mortgage in St. Croix, amongst their children and grandchildren, and appointed their son and the husband of one of their deceased daughters (both of whom were Danish subjects domiciled in St. Croix) their executors. In 1814, Seaton made a separate will, by which he gave the mortgage-money to his wife. He died in 1819. In 1822, his widow made a will, by which she gave the money to two of her daughters. She died in the same year. The separate wills were proved in the Prerogative Court of Canterbury. The joint will was afterwards proved in St. Croix by the executors named therein. It appeared that by the Danish law there is a court called a Court of Dealing, whose duty it is to ascertain how the assets of deceased persons within the Danish territory are to be administered, with an appeal to the Supreme Court of Copenhagen; and that persons who are appointed executors may constitute themselves a Court of Dealing for that purpose. The persons who were named executors in the joint will, availing themselves of this law, constituted themselves a Court of Dealing, and awarded that the law of the domicil should be disregarded, and that the property in St. Croix ought to be distributed according to the joint will and the laws of Denmark. These persons were clearly acting as judges in a matter in which they were personally interested: and the Vice-Chancellor (Sir L. Shadwell) not only applies the principle which Mr. Chambers has referred to as to a party interested, but, declining to enter into the question how far it is competent to courts of this country to allow a dispute with respect to judgments of a foreign country, he says (1): "But this I apprehend I am at liberty to do, namely, to see whether a judgment obtained abroad has been fraudulently obtained or not: and I apprehend that, if the Court finds that certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place." The only other case I will refer to is *Doe*

(1) 8 Simon, at p. 302.

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v. *Haddon* (1), where it was held that, in ejectment against a schoolmaster who has been removed by sentence of the trustees of the school, for misbehaviour, it is not necessary for the lessor of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them: but it appears to have been considered by the Court that evidence of corruption on the part of the trustees was admissible. I think that is nothing more than is suggested in the case of *Reg.* v *Governors of Darlington Free Grammar School* (2), where all the authorities are collected. There, the pleadings raised the question whether or not there was sufficient ground for the dismissal of the schoolmaster. In the result the Court held that the governors might dismiss the schoolmaster at their discretion, and that the causes of removal need not be shewn in pleading; but Lord Denman, in delivering the judgment of the Court of Queen's Bench, says (3) that the exercise of discretion might have been disproved in fact, "as, by shewing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place." That case is no authority that, in a collateral proceeding, the judgment of a competent Court can be questioned because some of the judges had an interest. I abstain from noticing the cases where the judgments of foreign Courts have been allowed to be impeached on the ground that they are contrary to natural justice. They all stand upon grounds which are totally different from the principles which are applicable to this case. The magistrates here, in my opinion, had no such interest as would make them judges in their own cause. For these reasons I have come to the conclusion that the course adopted by my Lord at the trial was quite right, and that this rule should be discharged.

BYLES, J. I am of the same opinion; and I should have abstained from adding anything, but that I conceive it to be right that the plaintiff should know the grounds upon which I rest my judgment. It cannot be disputed that the court of quarter sessions was a competent jurisdiction to entertain the charges against Mr. Wildes. The first thing to inquire into is, whether their order or adjudication was good upon the face of it. It was said that the information or complaint which was laid before them did not charge any misdemeanour for which the clerk of the peace was

(1) 3 Doug. 310. (2) 6 Q. B. 682. (3) 6 Q. B. at p. 696.

liable to prosecution. But it is plain that the word "misdemeanour" in the 6th section of the statute means the same thing as the expression used in s. 5, which enacts that the appointment of the clerk of the peace shall enure "for so long time only as such clerk of the peace shall well demean himself in his said office." The two expressions "misdemean" and "well demean" are correlative, and serve to explain each other. He is within the meaning of the act if he behaves improperly in his office. Now, if the order of the sessions for the payment of Mr. Scudamore's bill was a valid order, and the clerk of the peace wilfully refused obedience to it, he was clearly guilty of improper behaviour in his office: and the judgment dismissing him is good upon the face of it. Then, can a judgment of a competent tribunal, which is good upon the face of it, be impeached by extrinsic evidence? It may be conceded that, if a judgment has been obtained by fraud, or is contrary to natural justice, it may be impeached in a collateral proceeding. But nothing of the sort is suggested here: no fraud, no corruption is imputed to the magistrates. Assuming for a moment that, if it could be shewn that the magistrates who ordered the dismissal of Mr. Wildes, or some of them, had an interest in the matter, their judgment might be impeached,—had they any such interest here? It may be that they may have had an interest in making the order for the payment of Mr. Scudamore's bill. But, in making the order now in question, they could have no interest, unless it be that they may be said to have been interested in getting rid of an obnoxious person. That, however, is an interest which such a tribunal must always have. The statute which gives them jurisdiction to remove the officer confers upon them that interest. The only remaining question is, whether it is any ground of objection that the magistrates were the judges and also the prosecutors. The offence to be inquired into was an offence committed by the clerk of the peace against the Court. Contumacy to the Court may clearly be punished by the Court itself. This case bears a strong analogy to the ordinary case of a contempt of one of the superior courts. There, the judge himself suggests the contempt: and it is inquired into before him. (1) It would be no

(1) See the authorities collected in *Ex parte Fernandez*, 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.

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objection to a proceeding against an officer of this Court, that it is instituted by order of the Court, although the Court (or a member of it) might have to appoint his successor. In all cases of contumacy or contempt committed against a court of justice, the proper tribunal to proceed to punishment is the Court itself. It occurred to me at one time that it might have been better that the complaint should have been preferred by and tried before some others of the magistrates than those whose order was disobeyed: but, upon reflection, I see no substantial reason for saying that the course pursued was not the proper and legitimate course. The whole body of the justices were the real prosecutors.

MONTAGUE SMITH, J. I am of the same opinion. It was scarcely argued by the counsel for the plaintiff that the charge exhibited against him at the quarter sessions did not disclose matter which amounted to a misdemeanour within the statute. It is not confined to a criminal or indictable offence. The plaintiff was clearly guilty of misbehaviour in his office: he wilfully and contumaciously refused to enter an order lawfully made by the Court, and which it was his duty to enter and give effect to. Whether or not the evidence laid before the quarter sessions substantiated the charges, I abstain from entering into; that question does not arise before us. It is an essential attribute in the constitution of all courts of record that their judgments are conclusive as to the facts upon which they profess to proceed, and cannot be traversed. The argument most insisted upon was, that we are at liberty to inquire into the validity of this order or adjudication, because the Court which pronounced it was improperly constituted, and void. The two grounds upon which this argument is based are scarcely distinguishable in principle: they are, first, that the justices or some of them had a direct pecuniary interest in the matter out of which the charge arose; secondly, that they were prosecutors as well as judges. As to the former, I am utterly at a loss to see what interest any of them could have in the matter. It is urged that the order which the plaintiff disobeyed, and his disobedience of which was the foundation of the complaint against him, was one which might have affected such of the justices as were parties to the proceedings in which Mr. Scudamore's bill was incurred, inasmuch as they were personally liable to that gentle-

man. The order, however, for the payment of the bill appears to have been acted upon, therefore there could be no possibility of interest on that score. Then, it is said that the justices were both parties and judges in the matter. But the maxim "Nemo sibi esse judex vel suis jus dicere debet," cannot have any reference to a state of things like this, where the relation is created by statute, and the judges have a duty imposed upon them to investigate and decide. Suppose the clerk of the peace were wilfully to falsify a record of the Court, is it to be said that they have not power to bring him before themselves and investigate such a charge? It would plainly be their duty to do so. And the same principle must apply to any other offence. The justices in sessions are of necessity the judges exclusively to determine the question. It seems to me beyond all doubt that my Lord rightly held at the trial that it was not competent to the jury to inquire into the validity of the order, and that the plaintiff was properly dismissed.

ERLE, C.J. I shall content myself with saying that I retain the opinion which I expressed at the trial. The reasons have been so fully and ably given by my learned Brethren, that I do not think it necessary to add a word.

Rule discharged.

Attorneys for plaintiff: *Nethersole & Speechly.*
Attorneys for defendant: *Palmer & Bull.*

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June 5.

BREMNER AND FOUR OTHERS *v.* HULL.

Parish Law: Custom for Appointment of Churchwardens—Evidence: Declarations of a deceased Rector—Statutory Declaration by Churchwardens, under 5 & 6 *Wm.* 4, *c.* 62, *s.* 9—*Misjoinder of Plaintiffs: entering Judgment for those proved to be entitled, under s.* 19 *of the Common Law Procedure Act*, 1860, 23 & 24 *Vict. c.* 126.

The parish of Prestwich, in the county of Lancaster, formerly consisted of six several townships or hamlets, viz. Prestwich, Unsworth, Great and Little Heaton, Tonge-cum-Alkrington, Outwood, and Whitefield, each of which had its own churchwarden, and collected its own church-rates, which afterwards formed a common fund for the parish. In 1848, Whitefield was by order in council created a separate rectory, and thenceforth ceased to form part of the parish of Prestwich, or to furnish a churchwarden or to contribute any rates thereto.

The evidence of the custom as to the appointment of churchwardens was as follows:—In the township of Prestwich, the outgoing churchwarden, either orally or in writing, presented to the rector the names of two persons (one of whom might be himself), of whom the rector chose one to be churchwarden for the ensuing year: in each of the other hamlets or townships the selection of the persons submitted to the rector's choice was made at a meeting of the rate-payers of the hamlet or township. As to Prestwich this course was not always strictly adhered to; the churchwarden for the time being was sometimes, when circumstances rendered it convenient, requested by the rector to continue in office for another year. Upon a special case, in which it was agreed that the Court should draw inferences of fact:—

Held, that the custom was valid and sufficiently proved, notwithstanding the occasional deviations; and that the severance of the hamlet of Whitefield from the rest of the parish of Prestwich did not affect the validity of the ancient custom.

Declarations of a deceased rector were received as evidence of the custom.

In 1863, the rate-payers of the township of Prestwich claimed to be entitled to appoint a churchwarden, or to nominate two persons to be submitted to the rector for his choice; and at a meeting held for that purpose the defendant was appointed churchwarden, and proceeded to collect a church-rate in the township of Prestwich. In an action by the five churchwardens appointed according to the above custom, to recover from him the money so levied:—

Held, that the action was maintainable, although it appeared that some of the plaintiffs had omitted to make the declaration prescribed by the statute 5 & 6 Wm. 4, c. 62, s. 9—the Court having power under the 19th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) to give judgment for such of the plaintiffs as might be proved to be entitled.

And *semble*, that a churchwarden of the former year (who had made the required declaration) might, if necessary, be substituted for the disqualified plaintiff.

THE declaration was for money received by the defendant for the use of the plaintiffs, and for money found due upon accounts stated. Plea, never indebted.

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The cause came on for trial before Shee, J., at the Liverpool spring assizes, 1864, when a verdict was entered for the plaintiffs for 6*l.*, with leave to the defendant to move to enter the verdict for him, or a nonsuit, upon all the points open upon the evidence; the Court to draw any inferences of fact from the evidence received as to the custom.

A rule nisi was obtained accordingly, on the following grounds, 1. That the plaintiffs were not proved to have been duly elected and appointed churchwardens; 2. That the custom alleged by the plaintiffs was not proved; 3. That the plaintiffs had not made the necessary declarations (under 5 & 6 Wm. 4, c. 62, s. 9) before entering on the office. By agreement a special case was afterwards stated, the evidence being set out from the notes of the learned judge, supplemented by extracts from the parish books. The case was in substance as follows:—

The plaintiffs, John Alexander Bremner, James Royle, Richard Denham Walker, Marshall Heaton, and John Lancashire, claim to be churchwardens for the parish of Prestwich, in the county of Lancaster. The parish of Prestwich consists of the township of Prestwich, the hamlet of Unsworth, in the township of Pilkington, the townships of Great and Little Heaton, the township of Tonge-cum-Alkrington, and the hamlet of Outwood, in the township of Pilkington; and Bremner claimed as churchwarden for the township of Prestwich, Royle for the hamlet of Unsworth, Walker for the townships of Great and Little Heaton, Heaton for the township of Tonge-cum-Alkrington, and Lancashire for the hamlet of Outwood.

The defendant claimed to be churchwarden for the parish of Prestwich, as representing the township of Prestwich; and the sum sought to be recovered in this action was received by him, professing to act as such churchwarden, in respect of a church-rate of 1*d.* in the pound laid on the township of Prestwich.

The hamlet of Whitefield in the township of Pilkington originally formed part of the parish of Prestwich, and had its separate churchwarden: but by an order in council of March 2nd, 1848, Whitefield was separated from that parish and annexed to the perpetual curacy of All Saints, Stand, which was created a rectory.

It was alleged on the part of the plaintiffs that a custom or

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usage had existed from time immemorial in the parish of Prestwich for the nomination and appointment of churchwardens, such custom being as follows:—Two fit and proper persons are nominated by an annual meeting (held for that and other purposes) of the rate-payers in Unsworth; two by a like meeting of the rate-payers in Great and Little Heaton; two by a like meeting held alternately at Tonge and Alkrington of the rate-payers within those respective townships; two by a like meeting of the rate-payers of Outwood; and two *by the outgoing churchwardens* (1) *in respect of the township of Prestwich*: and that the rector appoints one of the two persons so nominated in respect of each hamlet or township,—each of the persons so appointed being a churchwarden for the whole of the parish, as representing the hamlet or township by or in respect of which he has been nominated.

The defendant denied the existence of the alleged custom as respected the township of Prestwich, and also its validity, and further contended that it had been departed from and determined. He also objected that the plaintiffs were not proved to be duly elected and appointed churchwardens, and that they, or some of them, had not made the necessary declarations (under 5 & 6 Wm. 4, c. 62, s. 9) before entering on their office.

The Rev. H. M. Birch, the now rector of the parish of Prestwich, stated that he was inducted into the rectory in May, 1852; that the parish now consists of the townships of Outwood, Unsworth, Great and Little Heaton, Tonge-cum-Alkrington, and Prestwich; that the hamlet of Whitefield had formerly been part of the parish, but had ceased to be so since 1848; that, as to Prestwich, the invariable course pursued in his time for the appointment of the churchwarden of that township had been, that the outgoing churchwarden either communicated to him verbally or sent him a written list (which might include his own name) for selection by him of one as his successor, and that he selected one and announced his selection at the Easter meeting of the parishioners; that, as to Outwood, Unsworth, Great and Little Heaton, and Tonge-cum-Alkrington, he received a like communication, sometimes verbally and sometimes in writing, of two or three names, of which he selected one to be the churchwarden; that the five plaintiffs were

(1) That is, the outgoing churchwarden of the township of Prestwich.

so appointed, and their appointment was announced at a meeting of the parishioners held on the 8th of April, 1863, for the purpose of passing the accounts and making a church-rate, at which meeting a rate of 1*d.* in the pound was proposed and carried; that, on the 29th of March, 1862, he received a letter from Mr. F. Robinson, a solicitor of Manchester, which gave him the first intimation that this course of appointing the churchwardens was objected to (1); that, on the 16th of March, 1863, he received a notice signed by certain rate-payers of the township of Prestwich, requiring him to convene a meeting for the purpose, amongst other things, of fixing upon "fit and proper persons whose names were to be forwarded to the rector of Prestwich as fit and proper persons from whom he might select and choose one to fill the office of churchwarden for the parish of Prestwich, in respect of the township of Prestwich, for the ensuing year;" that, occasionally, for the convenience of the parish, as, for instance, where repairs of the church or of the chancel had been commenced in his time, he had requested the churchwarden for Prestwich to remain in office another year, in which case no names were presented to him; that the church-rates when levied all went into one fund; and that, since the separation of Whitefield from the parish, that hamlet had not contributed to the rates for Prestwich.

Dr. Rushton, who had been rector of Prestwich from 1847 to the spring of 1852, stated that, when he first became rector, there were six churchwardens for Prestwich, one for each township or hamlet, and that on the making of the order in council of March,

(1) The material part of Mr. Robinson's letter was as follows:—

"I am desired to call your attention to the present position of the church at Prestwich, so far as regards the office of churchwarden.

"For some time past a practice seems to have prevailed for one churchwarden only to be appointed, a practice which is now found to be inconvenient to the laity and detrimental to the best interests of the church. I am sure I need not bring to your notice that, by the common law of England, which binds both clergy and laity, and the canons of 1603, which bind the clergy, churchwardens are to be chosen by the joint consent of the minister and parishioners, if they can agree; but, if they cannot agree upon such choice, then the minister is to choose one and the parishioners another; and that, without such a joint and several consent, none are to take upon themselves the office of churchwarden.

"I am desired further to state to you that it is the intention of the parishioners of Prestwich to act upon their undoubted right at the ensuing Easter, of appointing one churchwarden."

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1848, Whitefield ceased to form a part of or to return a churchwarden for the parish of Prestwich, or to contribute to the church-rates thereof; that, during his time, a separate churchwarden for the township of Prestwich was always appointed by the rector selecting one person out of two returned to him by the churchwarden of the previous year; that, for the other four townships the outgoing churchwarden of each returned to him the names of two persons (how obtained he knew not) of whom he selected one to serve as churchwarden in respect of the particular district; and that during his incumbency no meetings were held in the township of Prestwich for the nomination of churchwardens. On cross-examination, Dr. Rushton admitted that, on one occasion, in 1851, he had appointed a Mr. Openshaw, who was not presented to him, but who was so appointed with the consent of the outgoing churchwarden (a Mr. Costen), who had acted for three years as churchwarden for the township of Prestwich, and who wished to retire from the office.

The Rev. B. Crompton, who was curate of Prestwich from 1844 to 1847, and the Rev. Thomas Corser, who was curate from 1823 to 1826, gave similar evidence. The last-mentioned gentleman had married a daughter of the Rev. Mr. Lyon, who was rector of Prestwich for more than fifty years. He was asked whether he had heard the Rev. Mr. Lyon say what the custom was. The question was objected to by the defendant's counsel, as being a statement made by the rector whose interest was opposed to that of all the other inhabitants of the township. The learned judge overruled the objection; and in answer to the question the witness stated that he had frequently heard the Rev. Mr. Lyon say that the custom as to the appointment of churchwardens in the township of Prestwich was, for the outgoing churchwarden to submit two names to the rector, of whom the rector chose one.

Several persons who had filled the office of churchwarden in Prestwich were also called, all of whom affirmed the custom to be as above stated as to the township of Prestwich (though some of them remembered instances of the same person filling the office for two or more years in succession), and that as to the other four places, the names presented to the rector were agreed on at a

meeting of the rate-payers in the particular township or hamlet, who selected one for each.

The parish books, which were to be referred to as part of the case, contained entries relating to the appointment of churchwardens for the parish of Prestwich from 1675 to the present time. Down to the year 1826, with some few omissions, these entries described the six persons named as "elected," or "elected and chosen," or "chosen" churchwardens, sometimes stating the township or hamlet for which each served, and sometimes not. From 1826 to 1847 the names only appeared.

In the minute-book, under date the 31st of March, 1826, appeared a minute of a meeting of the ley-payers of the township of Prestwich, assembled pursuant to public notice, at which meeting was passed a resolution nominating certain persons to be churchwardens for that township for the year ensuing, and an entry that one of the persons so nominated was chosen by the rector and served the office.

The case also set out copies of the declarations under the 5 & 6 Wm. 4, c. 62, s. 9, made by the churchwardens for the years 1862 and 1863. The former appeared to have been made by five persons, viz. Buckley, Walker, Lancashire, Royle, and Butterworth; and the latter by four only of the now plaintiffs, viz. Bremner, Walker, Royle, and Heaton,—Lancashire making none: and Heaton's declaration was not made until after the commencement of the action.

Interrogatories under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), were also set out, under which the defendant admitted the receipt from several persons named of sums amounting together to 6*l.* as payments of a church-rate for the township of Prestwich made on the 8th of April, 1863.

On the part of the defendant it was submitted that there was no evidence for the jury of the custom relied on; that, to be valid, a custom must be unvarying and uniform, whereas the evidence here shewed that the supposed custom was continually varying; that the custom, if any, was destroyed by the severance of Whitefield from the rest of the parish of Prestwich in 1848; and that the plaintiffs were not entitled to maintain the action, because all

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of them had not made the declaration required by the 5 & 6 Wm. 4, c. 62, s. 9.

For the plaintiff it was insisted that the custom was a valid one, and was sustained by the evidence, and was unaffected by the severance of the hamlet of Whitefield, the appointments of churchwarden being separate for each township or hamlet; and, as to the statutory declaration, it was submitted that that made by Lancashire in 1862 was sufficient, inasmuch as he continued to serve as churchwarden for 1863; and that the fact of Heaton's declaration not having been made until after action brought might be cured by taking judgment in the names of the other plaintiffs only, under the 19th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126 (1), or by amending the record by striking out Heaton's name and substituting the name of Butterworth, who, in the absence of a valid appointment of a successor, would continue to be the churchwarden for the township of Tonge-cum-Alkrington, and who consented to be named as a plaintiff.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover or not.

S. Temple, Q.C. (*Mellish, Q.C.*, with him), for the plaintiffs. Upon the evidence stated in the special case, there is sufficient proof of the custom under which the plaintiffs were elected churchwardens, and of their election as such, to entitle them to recover: and the custom was not destroyed by the separation of the township of Whitefield from the parish of Prestwich, and its being created a separate parish under the authority of the statutes, though by reason of such separation the custom might cease to be applicable to Whitefield. The whole course of the evidence shews that the custom from time immemorial has been for the

(1) Which enacts that "the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover: Provided always that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a judge."

churchwardens of each of the townships forming the parish of Prestwich, on their retirement from office, to present two persons to be churchwardens for the ensuing year, of whom the rector chooses one. The mere fact of slight variances occurring, one only or three being presented instead of two, cannot have the effect of invalidating a custom which has been traced down an almost unbroken stream for nearly two centuries. As to the declarations of the Rev. Mr. Lyon, which were objected to on the ground of some supposed interest which he had as opposed to that of the parishioners, these were clearly admissible.

[ERLE, C.J. The rector is entitled to have two names presented to him to choose from. This is for his benefit. Suppose he says to the churchwarden, "I mean to appoint you: you need not name any one else," what possible objection can there be to that?]

Clearly none. The presentment of a list would in that case be an idle ceremony. That the canon law as to the appointment of churchwardens may be controlled by custom, appears from numerous authorities. In Blackstone's Commentaries (1) it is said: "Churchwardens are the guardians or keepers of the church and representatives of the body of the parish. They are sometimes appointed by the minister, sometimes by the parish, and sometimes by both together, as custom directs." That there may by custom be only one churchwarden for a hamlet maintaining its own poor separately from the parish at large, is clear from *Rex* v. *Inhabitants of Hinkley*. (2)

[*Milward, Q.C.*, intimated that he did not mean to contest the validity of the custom, if there was any evidence of it.]

It will be said that the effect of the order in council of the 2nd of March, 1848, separating Whitefield from the rest of the parish of Prestwich, was, to destroy the custom altogether. The only effect of that separation, however, is, that Whitefield no longer contributes to the body of churchwardens or to the church-rates of Prestwich.

Milward, Q.C. (*Sowler* with him), for the defendant. To oust the common law right of appointing churchwardens, a custom must not only be immemorial, but it must be uniform and unvarying, and it must be made out by clear and indisputable evidence. In

(1) Vol. i. 394; 4th edit. by Stephen, vol. iii. p. 38. (2) 12 East, 361.

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Bacon's Abridgment (1), it is said: "By the common law, the right of choosing churchwardens belongs to the parishioners, who are to be at the charge of repairing the church, &c., and therefore it is but fitting that they should have it in their power to determine what persons are properly to be entrusted in these concerns: nor doth any canon deprive them of this right; for, though by custom the parishioners in some places choose one and the parson another, yet this is by virtue of the custom, the validity of which, as of all other customs, must be determined in the King's temporal courts." Tindal, C.J., in delivering the judgment of the Exchequer Chamber in *Tyson* v. *Smith* (2), says: "It is an acknowledged principle, that, to give validity to a custom,—which has been well described to be an usage which obtains the force of law, and is in truth the binding law, within a particular district or at a particular place, of the persons and things which it concerns (3),—it must be certain, reasonable in itself, commencing from time immemorial, and *continued without interruption*." An instance of the strictness with which a custom is required to be observed is found in *Gibbs* v. *Flight*. (4) In that case the right of electing churchwardens was by custom vested in a select vestry composed of the rector and churchwardens and those inhabitants who had served the office of churchwarden or paid a fine for not serving; and they were to elect a new person every year into the office of junior churchwarden, the junior churchwarden of the preceding year succeeding to the office of senior churchwarden: and it was held that the repeated re-election of the same person to the same office of senior churchwarden, without any necessity for so doing, was a violation of the custom. Where the custom cannot have place, resort must be had to the canon. Here, the attempt is to set up a custom to appoint five churchwardens in this parish, when the original usage was to appoint six. The severance of Whitefield from the rest of the parish either destroyed the custom or it still was necessary that Whitefield should send its churchwarden, inasmuch as it did not appear that a district had been assigned to the newly-created district, pursuant to the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134.

(1) Churchwardens (A).

(2) 9 Ad. & E. 406, 421; 1 P. & D. 307.

(3) See *Le case de Tunistry*, Davys's Reports, 28.

(4) 3 C. B. 581.

Besides, the custom set up varies as to the several hamlets or townships. [The learned counsel then went minutely through the evidence and the entries in the parish books to shew instances in which the custom had been departed from; and he particularly relied upon what took place in 1826, when the then rector adopted the list presented by the rate-payers of the township of Prestwich.] Further, the plaintiffs are not in a position to maintain this action, as one of them had omitted to qualify himself to act as churchwarden by making the declaration required by the 5 & 6 Wm. 4, c. 62, s. 9. The case of *Stoughton* v. *Reynolds* (1) is a distinct authority to shew that a churchwarden must be re-sworn when re-elected, and therefore this defect cannot be got over by substituting the name of the outgoing churchwarden for the particular township. Lord Hardwicke in that case says: "As to the objection that the plaintiff" (who had been chosen churchwarden for a second year) "needed not re-swearing, it is otherwise; and, in corporations, where mayors are re-chosen, they are always sworn again, though there is a power to hold over."

Temple, in reply, referred to the 72nd section of the 3 & 4 Vict. c. 113, to shew that by the order in council Whitefield became a distinct parish.

ERLE, C.J. I am of opinion that our judgment in this case should be for the plaintiffs. This is an action brought by five churchwardens representing five townships or hamlets which constitute the parish of Prestwich, in the county of Lancaster, against the defendant who claims to be the duly elected churchwarden of one of those townships, viz. that of Prestwich, and who has in that character collected certain sums of money in that township as and for a valid church-rate. It seems clear, that, if the ancient custom had been pursued in the parish, each of the several townships or hamlets would have made a rate, which would have been separately collected in each, and the aggregate would have formed one common fund for the whole parish. Be that as it may, the five plaintiffs claim to be entitled to the money so collected by the defendant. The real question to be tried between the parties is, the validity of the custom set up by the plaintiffs for the

(1) 2 Stra. 1045.

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appointment of churchwardens in Prestwich township. That custom the plaintiffs allege to be, for the outgoing churchwarden to present two names to the rector, of which he selects one. As to the other hamlets or townships, the custom seems substantially to be for the rate-payers in each to hold a meeting and present two names to the rector for his selection of the person who is to fill the office of churchwarden for the ensuing year. Whether the evidence supports the custom as alleged, or not, is a question of fact upon which we are called upon to exercise the functions of a jury. After attentively considering the voluminous and somewhat complicated evidence which has been submitted to us, I have come to the conclusion that there is abundant to satisfy a jury that there is such a custom as the plaintiffs rely on; and I see nothing in the evidence to put into the other scale.

The documentary evidence and the testimony of living witnesses proves beyond all doubt that for a long series of years the outgoing churchwarden of the township of Prestwich has named two persons, of whom the rector has selected one to succeed him in the office. The defendant contends that the instances given where this course of proceeding has been departed from shew that the alleged custom, if otherwise a valid one, is not invariable and uniform: and it is contended further that the custom is detrimental to the interests of the parish, inasmuch as it virtually vests in the rector alone the power to appoint the churchwarden. The grievance suggested has never occurred. It is true that in some instances the custom has not been very strictly observed, the rector having for some reason of convenience, as, for instance, where repairs of the church or the chancel had been commenced in the time of one churchwarden, requested him to remain in office for the succeeding year. But there is no single instance of a departure from the custom in the sense contended for by the defendant, viz. by the rate-payers of the township of Prestwich assuming to present two names to the rector, as in the case of the other townships. An attempt was indeed made in 1826 to alter the course as to Prestwich. But that appears to me to tend strongly to support the plaintiffs' claim; for, it shews that the rate-payers had their minds directed to the subject now in contest: and, though a meeting was held and two names presented to the

rector, one of them appears to have been that of the outgoing churchwarden; and there is nothing in the parish books or elsewhere to shew that the names were not handed by the outgoing churchwarden to the rector in the usual way. The Rev. Mr. Corser, who was curate at the time, spoke to the custom as above described, which seems to have prevailed as far back as living memory went, and which does not appear to have been questioned since until the present occasion. I feel, therefore, justified in saying that the case made out for the plaintiffs is wholly unanswered.

Then, assuming that the evidence of the custom was sufficient, was the custom valid in point of law? If it had uniformly prevailed in point of fact, I can hardly think its validity in point of law would have been contested. Instances of customs somewhat similar are to be found in *Catten* v. *Barwick* (1), and *Astle* v. *Thomas*. (2) In the former the custom was, for the parson to appoint one and the two churchwardens the other; and, the two churchwardens being unable to agree, the parishioners, resorting to the canon, appointed, and their appointment was sustained by the Court. In the latter, the parish of Burton-upon-Trent, consisting of the township of Burton-upon-Trent, and also of several country hamlets, the custom appears to have been for the township of Burton-upon-Trent to appoint two churchwardens, and for the several other hamlets jointly to appoint two other churchwardens: and the Court assumed the appointment to be legal.

I do not stop to inquire as to the effect of the order in council of the 2nd of March, 1848. The Queen in Council undoubtedly has, under the authority of the statutes for that purpose (3), power to create a new parish; and I think this is peculiarly a case in which the maxim, "Omnia presumuntur rite esse acta," should be applied. I think the custom of appointing churchwardens in the parish of Prestwich is wholly unaffected by the circumstance of one of the hamlets of which it was composed being taken out of it. The substance, therefore, of my judgment is in favour of the plaintiffs.

There remains, however, an objection of form, viz. that one of the five plaintiffs had not made the declaration required by the

(1) 1 Stra. 145. (2) 2 B. & C. 271; 3 D. & R. 492. (3) 3 & 4 Vict. c. 113.

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5 & 6 Wm. 4, c. 62, s. 9, and therefore was not qualified to act as churchwarden. The answer to that objection is, that, if that person was incapable of acting, the former churchwarden for that township continues in office. The churchwarden is appointed for one year, and until a successor is legally appointed: and it cannot be necessary for a churchwarden so continuing in office to make a fresh declaration. The case of *Stoughton* v. *Reynolds* (1) is irrelevant, because there the outgoing churchwarden was elected again, whereas here the former churchwarden merely remains in office by act of the law until the office is filled by a duly constituted successor. And as to the case of the mayor which is there put by Lord Hardwicke, upon his re-election he takes a new office, and must of necessity be sworn again. If there be any real objection on the score of too many being joined as plaintiffs, there is a power of remedying that, which is created by the 19th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, which would undoubtedly be exercised by the Court on this occasion. As at present advised, however, I am of opinion that the plaintiffs are entitled to recover.

WILLES, J. I am of the same opinion. I think it unnecessary to say anything as to the question of misjoinder, because by the section of the Common Law Procedure Act, 1860, which has been referred to, we may give judgment in favour of such of the parties as we may find to be entitled to it. I will therefore proceed to deal with the substantial questions before us.

This is an action brought by five persons, who have been appointed churchwardens of the parish of Prestwich under an alleged custom, against one who professes to have acted as a duly elected churchwarden for one of the townships comprised within the parish, treating the custom as invalid by reason of the severance of one hamlet from the rest of the parish by an order in council, or as having failed in proof.

Upon the evidence presented to us in this special case, upon which we are to assume the province of a jury, it appears that for nearly two centuries there has been a course pursued in the election of churchwardens for this parish which differs both from the common and the canon law. That course has been precisely

(1) 2 Stra. 1045.

defined as to each of the townships or hamlets which form the parish of Prestwich. That such a custom may be valid, is hardly disputed. The main contest has been as to the evidence offered in support of it, so far as regards the township of Prestwich. As to this, the evidence shews a substantial adherence to the custom except in one particular instance, viz. in 1826, when an attempt was made to call it in question, but apparently without success, for it has gone on without interruption down to the present time. The ordinary nature of the division of parishes for ecclesiastical and temporal purposes is familiar, as is also the mode of appointing churchwardens where no special custom exists. In all the townships or hamlets of which the parish of Prestwich consists except one, viz. the township of Prestwich, the uniform practice has been for the inhabitants of each township to present to the rector two persons, of whom the rector chooses one. In the township of Prestwich the custom was for the outgoing churchwarden to present two, of whom the rector selects one. This is plainly a departure from the ordinary common-law mode of electing churchwardens. The case of *Catten* v. *Barwick* (1) is one in which the Court, at a time when questions of this kind were better understood and more frequently litigated than they are now, treated a custom not very dissimilar to this as a valid custom. It seems to me, therefore, that the custom was established in point of fact, and that it is a legal custom: and *Astle* v. *Thomas* (2) shews that there is no difficulty as to parties. Assuming that the custom as to the township of Prestwich were held to be invalid, this difficulty would arise: that township could not adopt the custom which obtains in the case of the other hamlets or townships; neither could the rule of the common law or the canon be resorted to, in the case of a difference between the rector and the parishioners, there being but one churchwarden to be appointed; and so the custom would be entirely destroyed as to the whole parish. As to the effect of the order in council creating Whitefield a new district, I am unable to see any difficulty. Taking away the cure of souls in a portion of a parish or district does not affect the cure of souls in the rest of the parish, or the rights, powers, and duties of the ecclesiastical officers appointed thereto. Upon the whole, therefore, subject to the obser-

(1) 1 Stra. 145. (2) 2 B. & C. 271; 3 D. & R. 492.

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vation I have already made as to the technical objection, I think the plaintiffs are entitled to judgment.

KEATING, J. I agree with my Lord and my Brother Willes that the custom relied upon by the plaintiffs was proved in point of fact and valid in point of law, for the reasons they have pointed out. I also agree that the severance of Whitefield from the rest of the parish by the order in council of March, 1848, in no degree affects the validity of the custom which has immemorially obtained in the township of Prestwich.

MONTAGUE SMITH, J. I also agree with the rest of the Court in thinking that the custom as to the appointment of churchwardens for the township of Prestwich was good in point of law and established in point of fact by evidence strong and uniform. The slight variations which have been relied on by the defendant are not sufficient to invalidate it. For this the case of *The Duke of Beaufort* v. *Smith* (1) seems to me to be abundant authority. Nor do I think the rights and powers of the remaining churchwardens are at all affected by the severance of Whitefield from the parish of Prestwich by the order in council of March, 1848. It is not like the case of the destruction of an integral part of a corporation. Upon the points of form, I do not think it necessary to add anything.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Chester & Urquhart.*
Attorneys for defendant: *Johnson & Weatheralls.*

(1) 4 Ex. 450; 19 L. J. (Ex.) 97.

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See BANKRUPTCY. 4.

ATTAINDER—*Rules of Descent—Corruption of Blood—Civil Death.*] A. having been attainted of treason escaped to a foreign country and there married, and had children, and was afterwards executed on the same attainder:—*Held*, first, that the marriage was valid, and the children legitimate.—*Held*, secondly, that the descent of property between brothers is immediate, and not through their father; and that the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder.
KYNNAIRD *v.* LESLIE 389

ATTESTING WITNESS, who is, within Bills of Sale Act 513
See BILL OF SALE.

ATTORNEY—*Articled Clerk—Service under Articles—Office or Employment—Acting as Steward of a Manor—23 & 24 Vict. c. 127, s. 10.*] The 10th section of the 23 & 24 Vict. c. 127 enacts that no person bound by articles of clerkship to any attorney, &c., shall during the term of service hold any office or engage in any employment whatever other than the employment of clerk to such attorney, &c., in the business, &c., of an attorney, &c., save as by the 6 & 7 Vict. c. 73, and that act otherwise provided:—*Held*, that an articled clerk was not guilty of an infraction of this provision, by having during his articles held the appointment of steward of a manor in which his family and himself were beneficially interested,—the duties being performed by a deputy (with whom he divided the fees), and the clerk having thrice only during two or three years, with his principal's consent, absented himself for a day in order to hold courts.
In re PEPPERCORN 473

2. ———— *Delivery of Bill—Agreement for a specific Sum.*] In the absence of a plea of no signed bill delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill and shewing charges fair and reasonable amounting to or exceeding the stipulated sum.
SCARTH *v.* RUTLAND 642

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3. ATTORNEY—*Client—Stakeholder—Deposit.*] Where a *solicitor acting for a vendor* receives the deposit on the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as stakeholder. If he professes to receive it as agent for the vendor he is bound to pay it over to him on demand.
ROSE EDGELL, EXECUTRIX OF ALEXANDER EDGELL, DECEASED, *v.* DAY 80

4. ————, order for production of books of, when obtainable in an action 656
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————————————, effect of protection under section 112 204
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————————————, discharge under s. 113 658
See BANKRUPTCY. 4.

BANKRUPTCY—*Debtor and Creditor—Protection Order*—12 & 13 *Vict. c.* 106, *s.* 112.] The word "creditor" in the Bankruptcy Acts, includes only creditors who are such at the date of the bankruptcy, and who have a right to come in under it to prove their debts; and a protection order under the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 112, is only available against such creditors.
PHILLIPS AND OTHERS *v.* POLAND 204

2. ————, *Petitioning-creditor and Trade-assignee, liability of, for Messengers' fees.*] The petitioning-creditor is personally liable, under 114th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), for the fees of the messenger in bankruptcy, down to the choice of assignees. And the trade-assignee is liable for those incurred subsequently, where there is evidence of personal interference by him, such as giving directions as to the management of the bankrupt's property while in the messenger's possession.
STUBBS *v.* HORN 56

3. ————, *Private Arrangement Act*, 7 & 8 *Vict. c.* 70—*Effect of Certificate under s.* 6.] A certificate, under the 6th section of the 7 & 8 Vict. c. 70, of the filing of the resolution of the creditors agreeing to a composition, with the commissioner's protection indorsed

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thereon, does not operate to protect the debtor's goods from seizure under a fi. fa. upon a judgment obtained before the date of the petition.
DAVIS *v.* PERCY 256

4. BANKRUPTCY—*Protection from Arrest—Discharge under s.* 113 *of the Bankrupt Law Consolidation Act*, 1849, 12 *&* 13 *Vict. c.* 106—*Attachment for non-payment of Money under Order of the Court of Chancery.*] An attachment for non-payment of money under an order of the Court of Chancery is an attachment for non-payment of a *debt* within the meaning of the 113th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. Where, therefore, the officer who had, under such process, arrested the plaintiff, who had been adjudicated bankrupt and had obtained his protection, refused, on such protection being shewn to him, to discharge the plaintiff, but detained him in his custody for a longer time than was necessary for obtaining a copy of the protection, and on the same day conveyed him to gaol, where the plaintiff was kept until an order of the Master of the Rolls was obtained for his discharge:—*Held*, that the officer was liable for the penalty of 5*l.* for *one day*, but not for the subsequent detention of the bankrupt by the gaoler, over whom the officer had no control. It is not necessary that the bankrupt should, at the time of shewing his protection, give the officer a copy thereof.
LEES *v.* NEWTON 658

5. ————, evidence of appointment of creditors' assignee in .. 667
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BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134, s. 192)—*Debtor and Creditor—Deed of assignment under—Reasonable provisions—Verification of Debts by statutory declaration or otherwise, as the Trustee may think fit—Giving Credit for Purchase-Money of Real Estate—Leasing unsold Estate—Giving Time for Payment, or compounding for or abandoning bad Debts.*] A deed of assignment under the Bankruptcy Act, 1861, contained a clause giving power to the trustee to require persons claiming to be creditors to verify their debts or claims "by statutory declaration proved before the Commissioners of Bankruptcy or otherwise, as the said trustee might think fit:" —*Held*,—reversing the decision of the Common Pleas,—that there was nothing unreasonable in this provision, inasmuch as the trustee must in some way or other ascertain whether or not the party claiming is really a creditor, and the claimant may appeal to a court of equity or to the Court of Bankruptcy, if his claim is improperly rejected.

The following provisions were also held not to be unreasonable:—

1. A clause giving the trustee a discretion to postpone the sale of all or any part of the real estate of the debtor, and to lease such unsold portion from year to year or for a term for such rent as he might think fit, and to give credit for the whole or any part of the purchase-money, either with or without taking security for the same.

2. A discretion to determine the amount of dividends, and to pay them at such place and in such manner as the trustee might think fit.

3. A discretion to give time for the payment of debts, or to compound for or abandon such as he might consider bad.

4. A clause for ascertaining the value of securities held by creditors by valuers to be appointed by either party, or an umpire.
COLES *v.* TURNER .. .. Ex. Ch. 373

2. ————————, *Debtor and Creditor—Deed of Inspectorship—General Averment that Deed in accordance with the Statute —Release.*] In pleading a release under the Bankruptcy Act, 1861,

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it is enough to set out so much of the deed as shews that it is a deed in accordance with the provisions of the statute, and that it is pleadable in bar as a release. Plea, that a deed was made and entered into between the debtor of the first part, three inspectors of the second part, and the creditors of the third part; that the deed related to the debts of the debtor, and his release therefrom, and the distribution of his estate, and was in all respects an inspectorship deed within the intent, meaning, and provisions of the Bankruptcy Act, 1861; that by the deed it was provided that if and when a composition of 10s. in the pound should have been paid to the creditors, or if and when (though the composition might not have been paid) the inspectors should certify that the estate had been fully administered, or that the assignment contemplated by the deed had been executed, the debtor should be absolutely released, &c.; and that, inasmuch as it was essential to the interests of the creditors that the debtor should not be harassed, it was declared and agreed, that, if any creditor should, whilst the deed was in force, commence or prosecute any action in respect of his debt, the deed and the provisions therein contained should operate and have the same force as an order of discharge under the Bankruptcy Act, 1861, and might be pleaded in bar as a defence or answer to such action: the plea then averred that the requisite number of creditors had assented to the deed, and that all necessary steps had been taken, &c., to make it binding on all the creditors, and that it was still in force:—*Held*, that it must be assumed that the deed was a valid deed under the statute, and that it was pleadable in bar as a release.

CORNER AND ANOTHER *v.* SWEET 456

3. BANKRUPTCY ACT, 1861—*Debtor and Creditor—Composition Deed—Composition payable within the Time limited for registering the Deed—Recital of Agreement to pay the Composition—Plea to the further Maintenance of the Action.*] It is no objection to a deed of composition under the 192nd section of the Bankruptcy Act, 1861, that the composition is payable before the expiration of the twenty-eight days allowed by s. 194 for registering the deed. A recital in such a deed, that the debtor has agreed to pay a composition of a given amount to all his creditors, amounts to a covenant. No formal commencement being, since the Common Law Procedure Act, 1854, necessary to a plea to the further maintenance of an action, it is enough if it discloses on the face of it matter which arose since the commencement of the action; and, if it be ambiguous and calculated to embarrass the plaintiff, he should apply to a judge.

BROOKS *v.* JENNINGS 476

4. ———, *Debtor and Creditor—Composition Deed—Reasonable Provisions.*] A composition deed, under the Bankruptcy Act, 1861, provided—first, that the trustees should be at liberty to sell any of the property to the debtors on credit, with or without security; secondly, that no former dividend should be disturbed, and no liability in consequence of such dividend incurred by the trustees, by reason of any debt due to any creditor, whereof the trustees should not have had notice before such dividend should have begun to be paid:—*Held*, reasonable provisions.

GREENBERG *v.* WARD AND ANOTHER 585

5. ———, evidence of appointment of creditors' assignee in bankruptcy 667

See EVIDENCE. 2.

BARRATRY, breach of rules of Merchant Shipping Act, 1854, not, unless intentional 600

See SHIP AND SHIPPING. 2.

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BILL OF EXCHANGE—*Acceptance for Honour—Forgery—Estoppel.*] A bill purporting to be drawn by A. at Lima, upon B. at Liverpool, payable to the order of C., and indorsed by C. to D., and by D. in blank, was presented for acceptance to B., by a person who represented himself to be D. B., having stopped payment, refused to accept, but gave the person who presented it a letter to the plaintiffs, discount brokers in London, with an intimation that the defendant, the London correspondent of A., would probably accept the bill for A.'s honour. The plaintiffs took the bill and B.'s letter to the defendant, and he, assuming the bill to be genuine, accepted it for the honour of the supposed drawer, and the plaintiffs thereupon discounted it. The drawing and indorsements turned out to be forgeries. In an action by the plaintiffs to recover the amount of the bill from the defendant:—*Held*, that the defendant, having induced the plaintiffs to part with the money upon the faith of his authentication of the bill, was estopped from denying its genuineness; and *semble*, that, the payee, being a fictitious or non-existing person, the bill was to be taken to be a bill payable to bearer.

PHILLIPS AND ANOTHER *v.* IM THURM 463

2. ——————————, *Bill drawn and indorsed in England, payable in France—Notice of Dishonour to English Indorser—Material Alterations.*] A bill for 250*l.* was drawn in England payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and indorsed by the drawer *in blank*, and by him delivered to the defendant in England; the defendant indorsed it *in blank*, and delivered it to the plaintiff in England, and he indorsed and delivered it to a banker in France for presentment. The bill was presented and dishonoured:—*Held*, that a notice of dishonour given to the defendant according to the formalities and within the time prescribed by the French law, was a good notice; first, upon the authority of *Rothschild* v. *Currie* (1 Q. B. 43): and, secondly, upon the ground that, if the contract of an indorser in England of a bill accepted, payable in a foreign country, be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such indorser, unless he has given due notice of dishonour according to the law of England, then, notice valid according to the law of the place where the bill is payable may be, and ought (unless the case is exceptional) to be, deemed due notice according to the law of England, that is, such notice as can reasonably be required under the circumstances.

The law of France requiring indorsements to be special, and to state a date and a consideration, the plaintiff turned the blank into *special* indorsements, by inserting the requisite words above each name on the back of the bill. He also, by writing on the face of the bill, professed to fix the rate of exchange at which the bill was payable. The special indorsement to the defendant stood thus:—"Pay to the order of Mr. E. T. Smith, at the rate of 25fr. 75c. for 1*l.*, value received, the sum of 6437fr. 50c., ut retro":—*Held*, such a material alteration of the rights and liabilities of the parties to the contract as avoided the bill in the hands of the plaintiff.

HIRSCHFELD *v.* SMITH 340

3. ——————————, acceptance of, by railway company, effect of 499
See RAILWAY COMPANY. 1.

BILL OF LADING—*Effect of Re-indorsement to the Consignor—Construction of the Bills of Lading Act*, 18 & 19 *Vict. c.* 111.] Goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an

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advance of money, and, on his re-paying the sum advanced, the bill of lading was re-indorsed and delivered back to him:—*Held*, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the ship-owners under the original contract; and consequently that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement.

Quære, whether one who takes a bill of lading by indorsement after a breach by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of the Bills of Lading Act, 18 & 19 Vict. c. 111?

SHORT *v.* SIMPSON AND OTHERS 248

2. BILL OF LADING, construction of 61, 649, 689
See SHIP AND SHIPPING. 1, 3, 4.

3. ——————, collision arising from negligence of crew not a peril of the sea within exceptions of 600
See SHIP AND SHIPPING. 2.

BILL OF SALE—*Affidavit—Residence and Occupation of Maker—Attesting Witnesses—Joint-stock trading Company.*] It is competent to a company established for trading purposes to give a bill of sale as a security for goods sold to or work done for them. An affidavit filed with a bill of sale so given, describing the company by its name, "The Glucose Sugar and Colouring Company," and stating the address of its principal office, is a sufficient compliance with the 1st section of the Bills of Sale Act, 17 & 18 Vict. c. 36. A bill of sale was executed under the common seal of a trading company. Opposite the seal were the names of two of the directors, who purported to sign as directors. The secretary, who was called as a witness, stated that "it was usual to affix the seal in the presence of the board, and for two directors to *attest* it:"—*Held*, that the directors signing as above were not "attesting witnesses" within the meaning of the Bills of Sale Act.

SHEARS *v.* JACOB 513

BILLS OF LADING ACT, fraud of shipper, holder, or of some person claiming under holder, meaning of 382
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BILLS OF SALE ACT, form of affidavit under 513
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BOND, divisibility of condition in 518
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BOROUGH VOTE, qualification for 148, 155
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BUILDING, meaning of word 148, 155
See PARLIAMENT. 1, 2.

CARRIERS—*Contract—Delivery within reasonable Time—Delay caused by third persons—Railway—Running Powers.*] A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control. The defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company, who had, under an agreement with the defendants, sanctioned by act

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of parliament, running powers over their line:—*Held*, that the defendants were not liable to the plaintiff for damage to his goods caused by the delay.
TAYLOR *v.* THE GREAT NORTHERN RAILWAY COMPANY 385

2. CARRIERS—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31,) *s.* 3—*Undue Prejudice—Collection of Parcels.*] A. collected parcels, and forwarded them by railway; the railway company refused to admit A.'s vans into their station after 6·30 P.M., but admitted their own vans and those of B. at a later hour with parcels, which they forwarded the same night. The time (6·30 P.M.) fixed by the company, as that after which they would not receive goods to be forwarded the same night, was reasonable. The company in admitting their own vans later acted bonâ fide, and not with the intention of gaining an undue advantage over other collecting carriers; they admitted B.'s vans in consequence of an injunction obtained by him. In two similar cases—*Garton* v. *Bristol and Exeter Railway Company* (6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306), and *Baxendale* v. *South Western Railway Company* (12 C. B. (N.S.) 758)—injunctions, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3, had been granted by this Court to restrain those companies from admitting their own vans into their station with goods to be despatched the same night at a later hour than those of other persons. On an application by A. for a similar injunction against the present defendants:—*Held* (by Erle, C.J., and Montague Smith, J.), that the exercise of this special jurisdiction by the Court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it are not binding on the Court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate; and that it ought not to be granted. *Held* (by Willes and Keating, JJ.), that the above cases were precedents binding on the Court, and also were rightly decided; and that the injunction ought to be granted.
IN RE PALMER AND THE LONDON AND SOUTH WESTERN RAILWAY COMPANY 588

3. ———, measure of damages in action against, for delay in forwarding goods 329
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4. ———, parol evidence admissible to vary written contract with .. 336
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CASE STATED BY JUSTICES, recognisances on, must be given by the appellant, when 423
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CATTLE—*Contagious Disease*—11 & 12 *Vict. c.* 107—*Licence to remove Cattle—Jurisdiction of Justices—Practice—Recognisances on a case stated under* 20 & 21 *Vict. c.* 43.] On the hearing of an information, under 11 & 12 Vict. c. 107, s. 4, for removing cattle without a licence, the magistrates, on the production of a licence, have no jurisdiction to inquire into the sufficiency of the evidence upon which it was granted. The recognisances required to be given by the appellant on a case stated by justices, under 20 & 21 Vict. c. 43, s. 3, need not be given within the three days mentioned in s. 2: it is enough if this is done before the case is given out by the justices.
STANHOPE, Appellant; THORSBY, Respondent 423

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CIVIL DEATH, effect of 389
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CLERK, ARTICLED: *See* ATTORNEY. 1.

CLERK OF THE PEACE—*Removal of, for "misdemeaning himself in his office," within the* 1 *W. & M.* c. 21, *s.* 6—*Interest in the Justices sitting upon the Inquiry at Quarter Sessions.*] A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, and upon a mandamus unsuccessfully resisted his claim, and thereby incurred costs, for the payment of which the quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the court and certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the court, and also because he thought the costs were not such as ought properly to be charged upon the county rate, but should have been paid by the justices, who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. The quarter sessions thereupon referred it to the finance committee, to consider and report what ought to be done under the circumstances; and upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, under the 1 W. & M. c. 21, s. 6, of having "misdemeaned himself in the execution of his office." The matter was heard before the justices at the next court of quarter sessions, and they unanimously found that the clerk of the peace had been guilty of the offence charged against him, and adjudged him to be dismissed from his office:—*Held*, that the justices in quarter sessions, being a competent tribunal to hear and determine the charge, and having determined it, this Court could not question the propriety of their decision; and that no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter.
WILDES *v.* RUSSELL 722

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COMPANIES ACT, 1862, illegal association under 148
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COMPANY—*Authority of Directors—Executed Contract—25 & 26 Vict. c. 89.*] A company was incorporated under 25 & 26 Vict. c. 89; the memorandum of association being signed by seven shareholders; no deed of association was filed and no other shares allotted; A. entered into an agreement to act as foreman of the "company's" works, which was signed by B. and C., two of the persons signing the memorandum of association, as "chairman" and "managing director," respectively. In an action by A. against the company for work done under the agreement:—*Held*, that in the absence of evidence to the contrary, the jury were justified in presuming that B. and C. had authority to bind the company.

TOTTERDELL *v.* THE FAREHAM BLUE BRICK AND TILE COMPANY, LIMITED 674

2. ————, *Winding-up under The Companies Act*, 1862 (25 & 26 *Vict. c. 89)—Amendment; adding a Plea.*] The defendants, who were members of an unregistered society enrolled and certified under the Industrial and Provident Societies Act, 15 & 16 Vict. c. 31, gave a promissory note in the following form for a debt of the society:—"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," &c.:—*Held*, that they were personally liable.

After the making of this note the society was registered under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), and, after action brought, an order was obtained for winding it up under the Companies Act, 1862 (25 & 26 Vict. c. 89), and proceedings, under that order, were taken in the county court. Section 202 of the Companies Act, 1862, enacts that where an order has been made, winding up an unregistered company, no suit or other legal proceeding shall be commenced or proceeded with against any contributory to the company, in respect of any debt of the company, except with the leave of the Court. The plaintiff had not obtained leave to proceed:—*Held*, that the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action; but only, if at all, by application to the Court in which the proceedings under the winding-up order were being pursued.

Quære, per Willes, J., whether the power of amendment at nisi prius extends to the allowance of such a plea?

GRAY *v.* RAPER AND SIX OTHERS 694

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CONSIGNOR, effect of indorsement of bill of lading to 248
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CONSTRUCTION—*Contract—Goods "to be delivered ex quay."*] A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at Liverpool per ship or ships from Calcutta. The contract contained provisions as to quality, and for arbitration in case of dispute; and then followed—"*The cotton to be taken from the quay:* customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale:"—*Held*,—affirming the judgment of the Court below,—that the clause as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the sellers, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time, and under reasonable circumstances, the article to be at the buyers' risk and charge from the time of its being landed on the quay.
NEILL AND ANOTHER *v.* WHITWORTH AND OTHERS Ex. Ch. 684

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3. ——— of invoice with note written on back of it 407
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4. ———, what are concurrent stipulations in contract of sale .. 484
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5. ——— of warranty against particular average in policy of insurance 535
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6. ——— of bill of lading 61, 649, 689
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CONTAGIOUS DISEASE: *See* CATTLE.

CONTRACT—*Construction—Agreement for Reference—Appointment of Arbitrator—Railway Amalgamation.*] A contract between the W. Railway Company and certain contractors for works upon the line contained a stipulation that any difference arising thereon should be referred to T., "if and so long as he should continue to be the company's principal engineer." After the making of the contract the W. Railway Company became merged in and amalgamated with the N. B. Railway Company, under an act of parliament, which provided that, notwithstanding the amalgamation, and the partial repeal of the special act of the W. Railway Company, all contracts should be proceeded with and enforced as if such repeal had not taken place, the N. B. Railway Company being in all respects with reference to such matters substituted for the W. Railway Company:—*Held*, that T., who still continued to be the engineer of the W. portion of the railway, but was not the "principal engineer" of the amalgamated company, was the proper referee in cases of disputes arising out of the above contract.

IN THE MATTER OF THE ARBITRATIONS BETWEEN THE WANSBECK RAILWAY COMPANY AND TROWSDALE AND OTHERS .. 269

2. ———— *Construction—Complete Performance rendered impossible by an Accident beyond Plaintiff's Control—Implied Promise.*] The plaintiffs contracted with the defendant to erect upon premises in his possession a steam-engine and machinery, the works being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them were so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable portion of the necessary materials for that purpose was upon the building, when the whole premises, with the machinery and materials, were destroyed by an accidental fire:—*Held*, that the plaintiffs were not entitled to recover the whole of the contract price; but that, inasmuch as the machinery was to be fixed to the defendant's premises, so that the parts of it when and as fixed would become his property and be subject to his dominion, and the contract must be taken to involve an implied promise on the defendant's part to keep up the building, they were entitled to be paid, as upon an implied contract, the value of the work and materials actually done and provided by them under the agreement.

APPLEBY AND ANOTHER *v.* MEYERS 615

3. ————, *Parol Evidence—Carrier.*] A., by parol, made arrangements with the defendants, a railway company, to convey cattle for him to K. station; he at the same time, without noticing its contents,

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signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.:—*Held*, that parol evidence was admissible to shew that the defendants had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract.
Jeffery v. *Walton* (1 Stark. 267) remarked on.
MALPAS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY 336

4. CONTRACT—*Vendor and Purchaser—Concurrent Stipulations.*] By a memorandum of agreement, A. agreed to sell to B. certain lands therein described, and all the mines, beds, and veins of coal, &c., under the same, at a certain price; and A. agreed to purchase from B. all coal that he might from time to time require, at a fair market price:—*Held*, that these were concurrent acts; and that B. could not sue A. for not taking the coal, without averring performance or a readiness to perform his part of the agreement.
BANKART AND ANOTHER *v.* BOWERS 484

5. ————, what sufficient under s. 17 of Statute of Frauds 1
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6. ————, in the absence of special, carriers not bound to deliver goods in any given time 385
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7. ————, effect of substituting one, for another 636
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8. ———— of attorney to be paid a specific sum, effect of 642
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9. ———— to refer to arbitration, what sufficient submission to be made a rule of court 671
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11. ————, for reference of matters to arbitration, construction of .. 679
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12. ————, effect of arbitration clause in 681
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13. ————, construction of, "goods to be delivered ex quay" 684
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14. ————, effect of alteration of, in discharging surety from liability .. 518
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COPY, examined, of record, proper evidence of conviction by police magistrate 553
See EVIDENCE. 1.

CORRUPTION OF BLOOD, effect of 389
See ATTAINDER.

COSTS—*Practice—County Court Appeal.*] An application for costs on an appeal from a county court will not be entertained unless made at the time the case is disposed of.
TAYLOR *v.* THE GREAT NORTHERN RAILWAY COMPANY 430

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2. COSTS, plaintiff admitting set-off after action brought entitled to, although claim thereby diminished to less than 20*l.* 576
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3. ——, liability to pay, after judgment 596
See TENDER.

COUNTY COURT—*Costs*—"*Admitted Set-off*"—19 & 20 *Vict. c.* 108, *s.* 24]. By 19 & 20 Vict. c. 108, s. 24, where in any action the debt or demand consists of a balance not exceeding 50*l.*, after *an admitted set-off* of a debt or demand claimed or recoverable by the defendant from the plaintiff, the county court shall have jurisdiction to try such action. The plaintiff sued in a superior court for a debt of 51*l.*, the defendant pleaded a set-off; and the cause having been referred, the plaintiff admitted the set-off, and had an award for the balance, which was under 20*l.*:—*Held*, that "admitted set-off" meant a set-off admitted before action brought; that a county court, therefore, had no jurisdiction over the plaintiff's cause of action, and the plaintiff was consequently entitled to costs.
WALESBY *v.* GOULSTON 576

2. ——————, an application for costs on an appeal from, will not be entertained unless made at the time the case is disposed of 430
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COURT OF BANKRUPTCY, certificate of appointment of creditors' assignee by, how proved 667
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CUSTOMS—22 *& 23 Vict. c.* 37, *ss.* 6, 8—*Importer.*] By the Customs Amendment Act, 1859 (22 & 23 Vict. c. 37), s. 6, any person who "shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination," shall be liable to a penalty. By s. 8, "the word importer in any act relating to the customs is to apply to, and include, any owner or other person for the time being possessed of or beneficially interested in any goods imported":—*Held*, that the interpretation of the word "importer," in the 8th section, is not to be applied to the phrase, "cause to be imported," in the 6th section; but that these latter words are only applicable to a person who has ordered the goods, or otherwise in fact caused them to be imported.
Held, also, that to constitute the above offence, it was not necessary

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that the goods of either denomination should be subject to duty on importation.
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DEBT, attachment of Court of Chancery for non-payment of money is an attachment for 658
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DEBTOR AND CREDITOR, meaning of word "creditor" in Bankruptcy Act 204
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EMPLOYMENT, meaning of, in 23 & 24 Vict. c. 127, s. 10 473
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ENCROACHMENT by tenant on waste land, effect of 259
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ERROR—*Error in fact—Error in law—Summoning special jury, and calling over the panel—Mis-trial.*] It is no ground of error, either in fact or in law, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 A.M., the time for which the special jurors were summoned,—it not being competent to the party to aver anything that is inconsistent with the record.

Semble, that error lies to the Exchequer Chamber upon a judgment on error in fact in the court below.

IRWIN *v.* SIR GEORGE GREY, BART. .. .. Ex. Ch. 171

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————, effect of acceptance of bill as 463
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EVIDENCE—*Assault—Conviction by police magistrate—Proof of conviction—24 & 25 Vict. c.* 100, *ss.* 42, 45.] A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it. Therefore, where a police

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magistrate, after hearing a case of common assault, ordered the accused to enter into recognizances and pay the recognizance fee, but did not order him to be imprisoned or to pay any fine, and an action having been subsequently brought for the same assault, the magistrate's clerk stated in evidence the above facts, but no record of the proceedings was put in:—*Held*, first, that the above was not a conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, and was not a bar to the action. *Held*, secondly, that the conviction, if any, was not proved .. 553
HARTLEY *v.* HINDMARSH.

2. EVIDENCE—*Bankruptcy—Appointment of Creditors' Assignee under ss.* 116, 123, *of the Bankruptcy Act*, 1861, 24 *&* 25 *Vict. c.* 134—*Sealing—Record of the Court of Bankruptcy.*] A certificate of the choice and appointment of a creditors' assignee, dated before action, and sealed with the seal of the Court of Bankruptcy, is conclusive evidence, in an action by the assignee so appointed, of his title to sue, even though it appears that the signature of the commissioner was not affixed to the document until after the commencement of the action,—the certificate of appointment being a *record* of the court.
KELLY *v.* MORRAY 667

3. ————, *Deposition of Witness taken under* 1 *Wm.* 4, *c.* 22, *Admissibility of—"Permanent" Sickness, what sufficient Proof of—Affidavit of medical Attendant—Power of Court to review the Judge's decision.*] Where a statute gives power to a judge at nisi prius to exercise a discretion as to the admission or non-admission of a document in evidence, his decision is subject to the general supervision and control of the Court out of which the record comes, unless the express language of the statute makes his decision final. The 1 Wm. 4, c. 22, s. 10, makes the deposition of a witness taken under it inadmissible in evidence, unless it shall appear *to the satisfaction of the judge* that the deponent is unable from *permanent* sickness or other *permanent* infirmity to attend the trial:—*Held*, that, though it is competent to the Court to review his decision, it is for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he shall think fit; and that the Court will not interfere, unless it be shewn that the judge has been misled by false evidence, or that injustice has resulted from the course pursued at the trial.

Quære, whether an affidavit of the witness's ordinary medical attendant would be admissible evidence for such a purpose? *Semble*, per Willes, J., that it would.

The word "permanent" in the above section does not mean that the sickness is an incurable one, but imports such a state of disability as to preclude the hope of the deponent being able to attend in any reasonable time.
THE DUKE OF BEAUFORT *v.* CRAWSHAY. 699

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7. ————, affidavit by defendant on moving for new trial, when not admissible 331
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9. EVIDENCE, parol, admissible to vary written contract 336
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EXAMINED COPY of record proper evidence of conviction by police magistrate 553
See EVIDENCE. 1.

EXCESSIVE DAMAGES—*Breach of promise of marriage—Affidavit of defendant on motion for a new trial.*] Upon a motion for a new trial, in an action for breach of promise of marriage, on the ground that the damages are excessive,—*Semble*, that the Court will not receive the affidavit of the defendant, for the purpose of explaining or contradicting the evidence given at the trial. In such a case, where the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury that, in estimating the damages, they are at liberty to take into their consideration the altered social position of the plaintiff in relation to her home and family, through the defendant's conduct towards her.
BERRY *v.* DA COSTA 331

EXCHEQUER CHAMBER, whether error lies to, or judgment on error in fact in court below 171
See ERROR.

EXECUTION—*Elegit—Local Board of Health—Land held for public purposes.*] Land which had been conveyed to a local board of health, for the purposes of the Public Health Acts, was used as a reservoir for the supply of water to the district of the local board. A judgment having been obtained against the local board in the name of their clerk:—*Held*, that the land was liable to be taken under a writ of elegit.
WORRAL WATERWORKS COMPANY *v.* LLOYD 719

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FELLOW-SERVANT, liability of master when servant injures 291
See NEGLIGENCE. 1.

FEME COVERTE: *See* HUSBAND AND WIFE.

FIRE INSURANCE—*Proximate Cause of Loss or Damage—Notice of Loss—Agent.*] By a policy of insurance, plate-glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises,"—none of the glass being "horizontally placed or moveable." A fire broke out on premises adjoining those of the plaintiff, and slightly damaged the rear of his shop, but did not approach that part where the plate-glass was. Whilst the plaintiff, assisted by neighbours, was removing his stock and furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, and broke the windows for the purpose of plunder:—*Held*, that the proximate cause of the damage was the lawless act of the mob, and that it did not originate from "fire, or breakage during removal," within the exception in the policy.
The policy, which had been effected through L., the local agent of the defendants, was subject, amongst others, to a condition, that "in

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case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the company." After the making of the policy, and before the loss, the defendants had transferred this branch of their business to another company. The plaintiff (not being aware of this transfer) gave notice of the damage to L., who made his report thereon to the latter company :—*Held*, that the notice to L. was a sufficient notice, within the above condition.
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FRANCE, what notice of dishonour requisite on bill drawn and indorsed in England, payable in 340
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FRAUDS, STATUTE OF, 29 *Car.* 2, *c.* 3, *s.* 4—*Contract to answer for the debt or default of a third person—Guarantee.*] The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that, if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill "without recourse," in other words, buy the bill of him :—*Held*,—affirming the judgment of the Court of Common Pleas,—that this was a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3.
MALLET *v.* BATEMAN .. .. Ex. Ch. 163

2. ——————————, *s.* 17—*Letter to an agent sufficient memorandum.*] A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds.
GIBSON AND ANOTHER *v.* HOLLAND 1

3. ——————————, *Memorandum of the bargain.*] A. having sold some cheeses and candles to B., sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back to the following effect: "The cheese came to-day, but I did not take them in for they were very badly crushed. So the candles and cheese is returned" :—*Held*, that the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds.
WILKINSON *v.* EVANS 407

FRAUDULENT MISREPRESENTATION, measure of damages in action for 559
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HUSBAND AND WIFE—*Conveyance by Married Woman—3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1.*] An order having been made under the 3 & 4 Wm. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, enabling a married woman, without the concurrence of her husband, to dispose of her reversionary interest in Government stock to which she was entitled under the will of her brother, upon the usual affidavit of the wife that she was living apart from her husband by mutual consent,—the Court refused to rescind the order, after it had been acted upon and rights of third parties had intervened, upon the application of the husband, who swore that, though he generally resided apart from his wife (upon an allowance made to him out of her separate estate), he occasionally visited and slept with her.
IN RE ALICE ROGERS 47

2. ———————, *Action for Necessaries supplied to the Wife—Finding of the Jury in a Suit in the Divorce Court—Estoppel.*] In an action for necessaries supplied to the wife of the defendant whilst living apart from him, the defendant relied for defence upon the adultery of the wife, to establish which he put in the proceedings in a suit against her in the Divorce Court, in which it was found by the jury that she had been guilty of adultery with the co-respondent, but in which there was no decree, the jury having also found that the petitioner had committed adultery:—*Held*, that, there being no judgment in the Divorce Court altering the status of the parties, the proceedings therein afforded no defence to the action.
Semble, that such a judgment or decree would be admissible under "never indebted."
NEEDHAM *v.* BREMNER 583

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IMPORTER, meaning of word in 22 & 23 Vict. c. 37, s. 8. 575
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INCLOSURE ACT—*Construction—Lord's Interest in the Soil of the Waste—Right of Shooting.*] By an inclosure act, the commissioners were authorized to apportion to the lord of the manor, *in satisfaction for his right and interest as such lord*, a certain quantity of the waste in cattle-gates. By a subsequent section,—reciting that the waste was of such small value as not to bear the expense of being allotted,—the commissioners were impowered to set it out in one inclosure, and to regulate the stint among the owners of land entitled to rights of common, awarding them sheep-gates in proportion to their several rights. The proprietors or persons entitled to the greater part of the sheep-gates were then impowered, with the consent of the lord, to appoint commissioners to divide this stinted pasture into allotments "to and amongst the proprietors of the said common or waste land, in proportion to their respective rights and interests therein." A further section reserved to the lord the right "to enjoy, search for, and work all mines, minerals, and other rights and privileges in the said waste (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the act had not been made":—*Held*, that the effect of the act was, to take from the lord his right to the soil of the waste, and with it the exclusive right of sporting thereon.
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I.O.U.—*Money lent—Account stated.*] The plaintiff lent money to A. upon B.'s promise to become surety for its repayment, and, after the money was advanced, A. and B. signed and delivered to the plaintiff the following memorandum: "We jointly and severally owe you 60*l.*":—*Held*, evidence for the jury of an account stated by A. and B. jointly.
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LANDLORD AND TENANT—*Incroachments by tenant on waste—Presumption that they are made for the benefit of his landlord—What sufficient contiguity or proximity—Intervention of a river.*] To raise the presumption that an incroachment on waste land by a tenant was made for the benefit of his landlord, it is not necessary that the land incroached upon should be contiguous or adjoining to, in the sense of conterminous with, the land held by him as tenant; it is enough if it be so near thereto that it may be presumed that his position as tenant enabled him to approve. Nor does the circumstance of the intervention of a small river and a fence and a narrow strip of waste between the holding and the incroachment rebut the primâ facie presumption, though there be no direct access between the two across the stream. About forty years ago, A., a labourer, in the course of three years completed the inclosure of four acres of waste land of the manor of P., separated only by a small river and a narrow strip of the waste from a farm held by B. under the lord; and when the inclosure was completed, B. paid A. 4*l.* 10*s.*, and took possession of the four acres, and occupied them with the farm. At the expiration of his term, B. claimed to be entitled to the fee-simple of the four acres; and, in ejectment by the lord, who claimed them as an incroachment by his tenant for his benefit, a verdict was taken for the plaintiff, the whole matter being reserved for the consideration of the Court, who were to draw inferences of fact:—The Court drew the inference that the in-

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croachment was made by A. as the servant of B.; and held that there was nothing in the relative position of the inclosure and the farm to rebut the presumption that B. held the inclosure as part of the farm.
THE EARL OF LISBURNE *v.* DAVID DAVIES 259

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MARINE INSURANCE—*Implied Warranty of Seaworthiness—Landing by Lighters.*] The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine insurance does not extend to lighters employed to land the cargo. Therefore, to a declaration on an ordinary policy on goods from Liverpool to Melbourne, "including all risk to and from the ship," the policy to endure until the goods should be discharged and safely landed at Melbourne, alleging damage by perils insured against, a plea—that the damage happened after the goods had been discharged from the ship and while they were in a lighter for the purpose of being conveyed to the shore, that the lighter was not seaworthy for the purpose, and that the damage was caused solely by such unseaworthiness—affords no defence.

LANE AND ANOTHER *v.* NIXON 412

2. ————————, *Insurable Interest—Contract of Sale—Amendment.*] A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool (who sold as agents or brokers for D. & Co., of the same place), at prices which were settled at the beginning of each year, wrote to them on the 14th of February, ordering a shipment of 100 tons, provided freight did not exceed 6*s.* 6*d.* On the 26th, B. & Co. wrote in answer:—"We have succeeded in fixing the schooner *Anne and Isabella* to carry about 115 tons at your limit of 6*s.* 6*d.* per ton. We presume we value upon you at six months from the date of shipment at 10*l.* per ton," &c.; adding in a postscript, "Please say if you purpose effecting insurance at your end." On the 3rd of March, A. wrote,—"I am favoured with yours of 26th. You say we presume we charge you 10*l.* per ton net cash, &c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9*l.* 15*s.* net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; and, now that you are making some changes, it may be as well that I should know how we are to get on for the future;" and he concluded with a request that some flowering shrubs might be sent to him "in charge of the captain." On the same day, A., through Joyce, a broker, effected an insurance on the guano per *Anne and Isabella* for 1200*l.* On the 4th of March the plaintiffs, B. & Co., having received A.'s letter of the 3rd, effected with the present defendants the policy now sued upon. The guano was shipped at Liverpool on the 4th of March, under

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a bill of lading making it deliverable "to B. & Co. or their assigns." The bill of lading (unindorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then at Belfast), who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday the 7th of March and informed him verbally of the shipment, to which he made no objection; and on the morning of Monday the 9th they went together to A.'s office, and there the bill of lading was indorsed and handed over with the invoice to A., who thereupon accepted a draft for the amount, which was afterwards satisfied. In the course of the Monday they heard for the first time that the *Anne and Isabella* with the guano on board had been lost on the Saturday night. A. sued the underwriters on the policy effected by him, and recovered the sum insured, less 50*l.* which he failed to receive in consequence of the insolvency of one of the underwriters, —this Court holding upon that occasion, in conformity with the verdict, that the letters of the 14th and 26th of February and 3rd of March constituted a complete contract so as to pass the property in the guano to A. on its shipment. An action was afterwards brought in the name of B. on the second policy, avowedly for the benefit of A., for the purpose of recovering the 50*l.*, and also certain expenses which he had been put to for extra costs, interest of money, &c., and which it was agreed should be together assessed at 200*l.*, if the underwriters on that policy were liable for anything. In this second action, A. and B. both swore that the contract of sale was not complete until Monday the 9th. The learned judge told the jury, that, in his opinion (and in this the jury agreed with him), the letters did not constitute a contract, and that there was no complete contract so as to pass the property until after the loss: and he ruled, as matter of law, that B. had an insurable interest "as an unpaid vendor, and with a bill of lading making the goods deliverable at Londonderry to him or assigns:"—*Held*, a misdirection; there being no insurable interest in B.

And the Court refused, under the circumstances, to allow an amendment, by alleging the interest to be in D. & Co., B.'s principals.

SEAGRAVE *v.* THE UNION MARINE INSURANCE COMPANY .. 305

3. MARINE INSURANCE, *Ship and Shipping—Suing and labouring Clause—"Particular Average"—"Particular Charges"—Warranty against particular Average—Evidence of Usage amongst Underwriters.*] The ship *Sebastopol*, of which the plaintiffs were owners, was chartered for a voyage from the Chincha Islands to the United Kingdom with a cargo of guano, at a freight payable on arrival at the port of discharge. The plaintiffs effected with the defendants a policy on the charter freight, which contained the usual suing and labouring clause and the following warranty,—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt." In the course of the voyage the vessel encountered a severe storm, and put into Rio, so damaged by perils of the sea as to be not worth repairing, and she was accordingly sold. The plaintiffs gave no notice of abandonment, but the guano having been landed and warehoused at Rio, the master procured another vessel, the *Caprice*, to carry it on to Bristol, for an agreed freight of 2467*l.* 11*s.* 10*d.* which the plaintiffs paid, receiving from the owners of the cargo the full charter freight. The master also incurred an expense of about 100*l.* in landing, warehousing, and reloading the guano at Rio:—

Held, that the plaintiffs were entitled to recover from the defendants, under the suing and labouring clause, the expenses so incurred and the freight of the *Caprice*, notwithstanding there had been no abandonment. *Held*, also, that evidence was admissible to shew that, by the usage amongst underwriters, the term "particular average" does not include expenses which are necessarily incurred in order to save

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the subject-matter of insurance from a loss for which the insurers would have been liable, and that these are usually allowed under the name of "particular charges." *Held*, also, that, the occasion upon which these particular charges were incurred being such as to be within the suing and labouring clause, the application of that clause was not excluded by the warranty against particular average.
KIDSTON AND OTHERS *v.* THE EMPIRE MARINE INSURANCE COMPANY, LIMITED 535

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See BILL OF EXCHANGE. 2.

MEASURE OF DAMAGES—*Carrier—Market Value.*] The plaintiff sent goods from Manchester by the defendants' railway to his traveller at Cardiff; the delivery of the goods was, through the negligence of the defendants, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff:—*Held*, that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay.
GREAT WESTERN RAILWAY COMPANY, Appellants; REDMAYNE, Respondent 329

2. ———————, *Fraudulent Misrepresentation.*] In an action for fraudulent misrepresentation the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. Therefore, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died:—*Held*, that the plaintiff was entitled to recover as damages the value of all the cows.
MULLETT *v.* MASON 559

3. ———————, *Sheriff—Escape.*] In an action against a sheriff for suffering a judgment debtor to escape, the jury in estimating the value of the custody, may take into account not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life, and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had remained in custody. Thus, in an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the only son of a wealthy father, who was upwards of 100 years old; and that, shortly before the arrest, the debtor's solicitor had offered to pay a composition on his debts of 6*s.* in the pound. The judge directed the jury to give as damages the value to the plaintiff of the chance that the debt, or any portion of it, would have been extracted by the debtor's remaining in custody:—

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Held, a right direction; and the jury having given substantial damages the Court refused to disturb the verdict.
MACRAE *v.* CLARKE 403

4. MEASURE OF DAMAGES—*Vendor and Purchaser—Covenant for quiet Enjoyment.*] The rule in *Flureau* v. *Thornhill* (2 W. Bl. 1078), that where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages *for the loss of the bargain*, does not apply to the case of a lease granted by one who has no title to grant it. A. was in possession of premises under a lease from B., which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of 400*l.*, obtained from B. a further lease of the same premises for *twenty-one years* and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases *in possession*, and not in reversion, and consequently that the lease so granted by him to A. in February, 1860, was void. A. thereupon obtained from the reversioners a fresh lease for *seven years*, at a considerable increase of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease:—*Held*,—affirming the judgment of the Court of Common Pleas,—that A. was entitled to recover, besides the 400*l.* premium which he had paid to B., and the costs of preparing the void lease, the value of what he had lost by B.'s breach of contract,—substantially the difference between the value of the term professed to be granted to him by the lease of February, 1860, and that of the seven years' term which he obtained from the reversioners.
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See BANKRUPTCY. 2.

METROPOLITAN BUILDING ACT, 1855 (18 & 19 *Vict. c.* 122), *s.* 108—*Notice of Action—Cumulative Penalty under s.* 94.] A person employed by a building-owner to erect a building adjoining the house of another, is not an "other person" within the meaning of the 108th section of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which requires a month's notice of action to be given before writ or process is sued out against "any district-surveyor or *other person*, for anything done or intended to be done under the provisions of the act." The penalty imposed by s. 94 on a building-owner who fails to make good "any damage he may occasion to the property of an adjoining owner by any works authorized to be executed by him, or to do any other thing upon condition of doing which his right to execute such works is by s. 83 limited to arise," is cumulative.
WILLIAMS *v.* GOLDING 69

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MONEY LENT, what amounts to evidence of an account stated .. 297
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MONEY PAID. The plaintiff under a bill of sale seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord having distrained them, the plaintiff paid the rent and expenses:—*Held*, that this was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request. *Exall* v. *Partridge* (8 T. R. 308) distinguished.
ENGLAND *v.* MARSDEN 529

MUSIC AND DANCING LICENCE, under 25 Geo. 2, c. 36 175
See THEATRE.

NECESSARIES, liability of husband for, supplied to wife 583
See HUSBAND AND WIFE. 2.

NEGLIGENCE—*Master and Servant—Fellow-servant—Common Employment.*] The plaintiff was employed by a railway company as a labourer to assist in loading what is called a "pick-up train" with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started,) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured:—*Held*, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.
TUNNEY *v.* THE MIDLAND RAILWAY COMPANY 291

2. ———, *Railway Company—Evidence for a Jury.*] The staircase leading from a railway station to a highway (being otherwise unobjectionable) had at the edge of each step a strip of brass which originally had been roughened, but which had from constant use become worn and slippery. The staircase was about six feet wide, and had a wall on each side, but no handrail. The plaintiff (a passenger by the railway, who was a frequent traveller by the line) in ascending from the station slipped and fell upon the stairs, and was much hurt. In an action charging the company with negligence in not providing a reasonably safe and convenient staircase, two witnesses for the plaintiff stated that in their opinion the staircase was unsafe, one of them (a builder) suggesting that brass nosings on the steps was improper, and that lead would have been better, because less slippery, and that there should have been a handrail:—*Held*, no evidence of negligence to go to the jury.
CRAFTER *v.* THE METROPOLITAN RAILWAY COMPANY 300

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3. NEGLIGENCE—*Unfenced Hole on Defendant's Premises—Injury to a Stranger rightfully there.*] Upon the premises of the defendant, a sugar-refiner, was a hole or shoot on a level with the floor, used for raising and lowering sugar to and from the different storeys of the building, and usual, necessary, and proper in the way of the defendant's business. Whilst in use, it was necessary and proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might at such times, without injury to the business, have been fenced by a rail. Whether or not it was usual to fence similar places when not in actual use, did not appear. The plaintiff, a journeyman gasfitter, in the employ of a patentee who had fixed a patent gas-regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole, and was injured:—*Held*, that, inasmuch as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced.
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5. ————, collision caused by, of crew not a peril of the sea within exceptions of bill of lading 600
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6. ————, gross, meaning of 600
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NUISANCE—*Highway Act*, 5 & 6 *Wm.* 4, *c.* 50, *s.* 72—*Lighting Fires by the side of the Highway.*] A fire lighted by a wheelwright for the purposes of his business, within fifty feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the outside of the premises, is not a public nuisance within the prohibition of the 72nd section of the Highway Act, 5 & 6 Wm. 4, c. 50.
STINSON, Appellant; BROWNING, Respondent 321

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2. NUISANCE—*Negligence—Highway—Liability to fence—Occupier.*] The plaintiff, in passing along a highway at night, fell into a "hoist-hole," which was within fourteen inches of the public way and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor:—*Held*, that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole; and that the hole was near enough to the highway to constitute a nuisance.
HADLEY *v.* TAYLOR AND OTHERS 53

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OFFICE OR EMPLOYMENT, meaning of, in 23 & 24 Vict. c. 127, s. 10 473
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PARISH LAW—*Custom for Appointment of Churchwardens—Evidence: Declarations of a deceased Rector—Statutory Declaration by Churchwardens, under* 5 & 6 *Wm.* 4, *c.* 62, *s.* 9—*Misjoinder of Plaintiffs: entering Judgment for those proved to be entitled, under s.* 19 *of the Common Law Procedure Act*, 1860, 23 & 24 *Vict. c.* 126.] The parish of Prestwich, in the county of Lancaster, formerly consisted of six several townships or hamlets, viz. Prestwich, Unsworth, Great and Little Heaton, Tonge-cum-Alkrington, Outwood, and Whitefield, each of which had its own churchwarden, and collected its own church-rates, which afterwards formed a common fund for the parish. In 1848, Whitefield was by order in council created a separate rectory, and thenceforth ceased to form part of the parish of Prestwich, or to furnish a churchwarden or to contribute any rates thereto. The evidence of the custom as to the appointment of churchwardens was as follows:—In the township of Prestwich, the outgoing churchwarden, either orally or in writing, presented to the rector the names of two persons (one of whom might be himself), of whom the rector chose one to be churchwarden for the ensuing year; in each of the other hamlets or townships the selection of the persons submitted to the rector's choice was made at a meeting of the ratepayers of the hamlet or township. As to Prestwich this course was not always strictly adhered to; the churchwarden for the time being was sometimes, when circumstances rendered it convenient, requested by the rector to continue in office for another year. Upon a special case, in which it was agreed that the Court should draw inferences of fact:—*Held*, that the custom was valid and sufficiently proved, notwithstand-

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ing the occasional deviations; and that the severance of the hamlet of Whitefield from the rest of the parish of Prestwich did not affect the validity of the ancient custom.

Declarations of a deceased rector were received as evidence of the custom.

In 1863, the ratepayers of the township of Prestwich claimed to be entitled to appoint a churchwarden, or to nominate two persons to be submitted to the rector for his choice; and at a meeting held for that purpose the defendant was appointed churchwarden, and proceeded to collect a church-rate in the township of Prestwich. In an action by the five churchwardens appointed according to the above custom, to recover from him the money so levied:—*Held*, that the action was maintainable, although it appeared that some of the plaintiffs had omitted to make the declaration prescribed by the statute 5 & 6 Wm. 4, c. 62, s. 9—the Court having power under the 19th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), to give judgment for such of the plaintiffs as might be proved to be entitled.

And *semble*, that a churchwarden of the former year (who had made the necessary declaration) might, if necessary, be substituted for the disqualified plaintiff.

BREMNER AND FOUR OTHERS *v.* HULL 748

PARLIAMENT—*Borough Vote—Companies' Act*, 1862 (25 & 26 *Vict. c.* 89)—*Illegal Association—Reform Act* (2 *Wm.* 4, *c.* 45); *Qualification of Voter — Occupation as Tenant under s.* 2 — *Building.*] A. and forty-five other persons hired land, upon which there was a stone building, the lower part of which (open in front) was used for feeding bullocks, and the upper storey (inclosed on all sides) for storing the produce of the land. The rent of the land was 473*l.* 10*s.* per annum, and the tenants paid tithes (to the amount of 28*l.* per annum) and other taxes. The value of the building was 6*l.* per annum. The business of the farm was conducted by a manager on behalf of himself and all the other partners. The partnership was not registered under the Companies Act, 1862, 25 & 26 Vict. c. 89:—*Held*, that this was an illegal association under s. 4 of the Companies Act, and consequently that the several members did not acquire the franchise as occupying tenants within the 27th section of the Reform Act, 2 Wm. 4, c. 45. Whether the "building," regard being had to its character and relative value, was such as would have conferred a qualification under section 27,—*quære*.

ROBERT HARRIS, Appellant; PETER FABYAN SPARKE AMERY, Respondent 148

2. ————, *Borough Vote—Reform Act—"Building" within s.* 27—*Description and relative Value of "Building" and "Land," where the qualification consists of both.*] The voter occupied, at a rent exceeding 10*l.* per annum, a piece of land with a stone building, roofed, upon it. The building had four walls and a door, and was used by the tenant for keeping guano and other manures which he used upon the land:—*Held*, that there was nothing in the character of the building, or in the use to which it was applied, to prevent it being such a "building" as to satisfy the requirements of the 27th section of the Reform Act, 2 Wm. 4, c. 45. Where the revising barrister had found that the building demised with the land was of a permanent nature, and useful for the occupation of the land upon which it was placed, and, on the case being sent back to him for amendment by stating whether the land with the building was of more real value to let than the land would have been without the building, further found that "the building was worth about 5*s.* a year to the tenant:"—*Held*,

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that, inasmuch as the building bonâ fide added to the real annual value of the land to let, though in a small degree only, the qualification was sufficient.

JOHN MORISH, Appellant; ROBERT HARRIS, Respondent .. 155

3. PARLIAMENT—*County Vote—Assignee of Lease—2 Wm. 4, c. 45, s. 20—6 Vict. c. 18, s. 74.*] A. being possessed of the residue of a lease for 999 years bequeathed it to trustees in trust, as to one-sixth of the rents, to pay them to B. for life, and after his death to his children :—*Held*, that B. was not the assignee of the residue of the term, within the meaning of section 20 of 2 Wm. 4, c. 45 (amended by 6 Vict. c. 18, s. 74), and was not entitled to a county vote.

GAINSFORD, Appellant; FREEMAN, Respondent 129

4. ————, *County Vote—Expunging Name of Voter—Qualification —6 Vict. c. 18, s. 40.*] The qualification of a county voter was stated in the list to be "freehold share in Fulham Bridge." His vote was not objected to, but the revising barrister expunged his name, on the ground that this Court, in *Tepper* v. *Nichols* (18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61), had decided that the shareholders in Fulham Bridge had no qualification :—*Held*, that, the qualification being good on the face of it, the revising barrister had no power to expunge the name, unless it was properly objected to.

SMITH, Appellant; JAMES, Respondent 138

5. ————, *County Vote—Notice of Objection—Date—6 Vict. c. 18, ss. 7 & 101.*] Notice of objection to a county vote under 6 Vict. c. 18, s. 7, need not be dated the same day as that on which it is signed : it is sufficient if it is dated some day within the limits allowed for giving notice, and while the objector is duly qualified to give it. *Parkinson* v. *Brophy* (15 Ir. C. L. Rep. 346) dissented from.

JONES, Appellant; JONES, Respondent 140

6. ————, *County Vote—Registration Act, 6 Vict. c. 18, s. 7—Notice of Objection to Overseers, Form of.*] A notice of objection to a county voter, served upon overseers, under the 6 Vict. c. 18, s. 7, was in the following form :—"I hereby give you notice that I object to the *names* of the *persons* mentioned and described below being retained in the list of voters," &c.—the several names and descriptions of the parties objected to being contained in a schedule at the foot of the notice :—*Held*, a sufficient compliance with the statute and schedule A, No. 4.

GEORGE MOORE SMITH, Appellant; JOHN HOLLOWAY AND OTHERS, Overseers of Whittlesey, Respondents 145

7. ————, *County Vote—Qualification—"Tenement" within 8 H. 6, c. 7—Rent seck—Distress under 4 Geo. 2, c. 28, s. 5.*] A rent-charge granted by a deed containing no power of distress is within the statute 4 Geo. 2, c. 28, s. 5, and therefore a "tenement" within the 8 Hen. 6, c. 7.

DODDS, Appellant; THOMPSON, Respondent 133

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PARTICULAR CHARGES, meaning of, in marine insurance 535
See MARINE INSURANCE. 3.

PARTNERSHIP—*Agency—Perception of Profits—Marriage Settlement.*] S., being about to commence business as an underwriter at Lloyd's, through the agency of one Fenn, in consideration of the defendant (the father of S.) engaging with Fenn to hold a sum of 5000*l.* available for his son for the purpose of carrying out the arrangement, gave the defendant the following memorandum :—"In consideration of your

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guaranteeing me to the extent of 5000*l.* in my business of underwriter, until by such business I shall make or acquire from the profits thereof 5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500*l.*, being equal to 10*l.* per cent. per annum on 5000*l.*; and, further, that, if at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years:" and the memorandum concluded with these words:—"moreover, in no case are you to be considered as a partner with me in the said business of an underwriter:" —*Held*, by the Exchequer Chamber, in accordance with the judgment of the Court of Common Pleas, that the above memorandum did not constitute the defendant a partner with his son.

By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., *as trustees*, "all and singular the sums of money, earnings, *profits*, and emoluments which are now in the hands of Fenn, and all such as shall hereafter come into the hands of Fenn, on account or in respect of the said underwriting business." The deed also contained a power of attorney authorizing the defendant and his co-trustee to receive *the whole proceeds of the business*; and the first trust was, to pay the defendant 500*l.* a year, with an additional sum when the profits of the business should have realized a given sum, and a covenant, that, when the accumulated profits should have reached 8500*l.*, and continued at that amount without reduction for two years, the trustees should re-assign to S. "the said moneys and *profits* arising from the aforesaid underwriting business."

In an action upon a policy signed by Fenn in the name of S., a special case was stated in which were set out the above-mentioned memorandum and marriage-settlement, and by which it was agreed that the Court should draw any reasonable inferences of fact:—*Held*, by the majority of the Exchequer Chamber,—reversing the judgment of the court below,—that the marriage-settlement did not, either alone or in conjunction with the memorandum, render the defendant liable as a partner with S. in his underwriting business:—*Held*, by Pigott, B., and Shee, J., that the effect of the settlement was, to give the defendant such a substantial interest in the business as to render him liable as an insurer on the policy.

BULLEN AND ANOTHER *v.* SHARP THE ELDER .. Ex. Ch. 86

PATENT—*Construction of Specification—Application of known Materials to an analogous Purpose.*] A. obtained a patent for "certain improvements in the construction of ships and other vessels navigating on water." By his specification, he claimed as his invention (amongst others), 1. the construction of ships "with *an* iron frame, combined with an external covering of timber planking for the sides, bilges, and bottoms;" 6. "the construction of iron frames adapted to an external covering of timber for the sides, bilges, and bottoms, *as described*:"—*Held*, that the expression "iron frame" in the first claim was not confined to an iron frame such as that specified in the sixth claim, but comprehended whatever might, according to the ordinary use of language, be called "an iron frame;" and that, inasmuch as the combination of iron and timber in the construction of ships was already well known and commonly used, the patent could not be sustained.

JORDAN AND ANOTHER *v.* MOORE 624

2. ———, *Sewing Machines—Provisional and Complete Specification—Claiming Clauses—Effect of the words "as herein described."*] Any

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part of the provisional specification of a patent may be omitted in the complete specification, if there is no fraud, and the effect of the remainder is not altered by the omission. All the claiming clauses may be struck out of the specification of a patent by a disclaimer, if there remain in the body of the specification words sufficiently distinguishing what the invention is which the patentee claims. An alteration, verbal merely and not substantive, by means of a disclaimer will not make a patent void. A specification to which drawings were attached after describing an instrument marked "g," continued, "It is the arranging an instrument 'g' as herein described, which, while it is the means of holding the fabric, ... is also the means by which the step-by-step movement is given to the fabric, which constitutes the peculiarity of my invention:"—*Held*, that this was not a claim of all instruments which were at once the means of holding and moving the fabric; nor on the other hand of the exact machine with all its arrangements contained in the drawings; but a claim to the exclusive right to use "g," or any similar instrument, for the purpose of holding and moving the fabric at the same time.
THOMAS *v.* WELCH 192

PAYMENT, to agent in ordinary course of business, effect of 186
See PRINCIPAL AND AGENT. 2.

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See TENDER.

PENALTY, what recoverable under s. 113 of 12 & 13 Vict. c. 106 .. 658
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PERILS OF THE SEA, collision caused by negligence of crew, not, within exceptions of bills of lading 600
See SHIP AND SHIPPING. 2.

PERMANENT SICKNESS, meaning of, in 1 Wm. 4, c. 22, s. 10 .. 699
See EVIDENCE. 3.

PERSONAL SERVICE, leave to proceed without 230
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PETITIONING CREDITOR, personally liable for the fees of the messenger in bankruptcy 56
See BANKRUPTCY. 2.

PLAINTIFF, misjoinder of 748
See PARISH LAW.

PLEA, form of, to further maintenance of action 476
See BANKRUPTCY ACT, 1861. 3.

———, amendment by adding 694
See COMPANY. 2.

———: *See* PRACTICE.

PLEADING: *See* PRACTICE.

POLICY OF INSURANCE: *See* MARINE INSURANCE; FIRE INSURANCE.

POWER, LEASING, in will, construction of 9
See WILL.

PRACTICE—*Compulsory Reference—Authority of Master.*] Upon a reference to the master under the Common Law Procedure Act, 1854, s. 3, of an action upon a building contract, although the master cannot delegate his authority, it is competent to him to inform his mind as to the amount and value of the work done, by sending a surveyor in whom

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he can confide to view and report to him thereon. But this does not preclude the parties from offering independent evidence on the subject, if so advised.

GRAY *v.* WILSON 50

2. PRACTICE—*Discovery under s.* 50 *of the Common Law Procedure Act*, 1854 (17 *&* 18 *Vict. c.* 125)—*Attorneys' Books—Affidavit.*] To entitle a party to discovery under the 50th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, he must shew by affidavit that his adversary is in possession of some one document to the production of which he is entitled. The Court will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries relating to the matters complained of.

EVANS *v.* LOUIS 656

3. ——————, *Leave to proceed under s.* 17 *of the Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76)—*Discretion of Judge at Chambers.*] The Court will not interfere with the discretion of a judge at chambers in refusing leave to proceed without personal service, under the 17th section of the Common Law Procedure Act, 1852. *Semble*, that it is not in all cases imperative to shew attempts to serve the defendant at his place of *residence*, where he has a place of business at which he is usually to be found.

TOMLINSON *v.* GOATLY 230

4. ——————, *Service of Writ abroad—Indorsement on Writ—Leave to proceed—Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 19, *Sch. A. No.* 3.] A writ of summons having been served on a foreigner resident out of the jurisdiction, with a notice indorsed allowing *seven* days for payment of the sum claimed, the time limited for appearance being *fourteen* days,—the Court refused leave to the plaintiff to proceed under section 19 of the Common Law Procedure Act, 1852; and held, that the irregularity was not waived by a subsequent admission of service and offer to settle.

GALLI *v.* MONGRUEL 46

5. ——————, *Setting aside Execution for Irregularity—Imposition by the Judge of Terms.*] The Court will not interfere with the discretion of a judge at chambers, where, upon a summons to set aside an execution for irregularity, *with costs*, he makes the order as prayed, adding, as a condition, that the defendant bring no action,—even though the order has not been drawn up.

BARTLETT *v.* STINTON 483

6. ——————, *Time to plead—Rule of Court, Easter Term*, 1856.] A defendant, who has a day's time to plead from the happening of an event, has the whole of the day following that on which the event happens in which to plead. The rule of court, which orders that "service of pleadings, if made after two P.M. on Saturday, shall be deemed as made on the following Monday," was not intended to affect the rights of parties, but only to relieve the clerks in the plea office. Therefore, when a defendant had one day's time to plead from the return of a cheque, which was returned on Friday, and the plaintiff signed judgment on Saturday after two o'clock, no plea having been delivered:—*Held*, that the judgment was irregular.

CONNELLY *v.* BREMNER 557

7. ——————, plea in action against surety that debtors' duties increased, effect of 217

See PRINCIPAL AND SURETY. 2.

8. ——————, plea to an award under s. 68 of Lands Clauses, &c., Act,

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that award included matter in respect of which claimant was not entitled to compensation 241
See RAILWAY COMPANY. 2.

9. PRACTICE, amendment of declaration in action on marine insurance 305
See MARINE INSURANCE. 2.

10. ————, time for moving to set aside an award 401
See ARBITRATION. 3.

11. ————, the recognizances required to be given by the appellant on a case stated by justices under 20 & 21 Vict. c. 43, s. 3, need not be given within the three days mentioned in s. 2; it is enough if this is done before the case is given out by the magistrates 423
See CATTLE.

12. ————, an application for costs on an appeal from a county court will not be entertained unless made at the time the case is disposed of 430
See COSTS. 1.

13. ————, in pleading release under Bankruptcy Act, 1861, it is enough to set out so much of the deed as shews that it is a deed in accordance with the statute and that it is pleadable as a release .. 456
See BANKRUPTCY ACT, 1861. 2.

14. ————, plea to further maintenance of action, form of 476
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15. ————, question as to power of railway company to accept bills properly raised by plea denying acceptance 499
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16. ————, certificate of acknowledgment of married woman filed after lapse of six years 533
See ACKNOWLEDGMENT BY MARRIED WOMAN.

17. ————, what sufficient submission in writing to be made a rule of Court 671
See ARBITRATION. 2.

18. ————, amendment by adding plea 694
See COMPANY. 2.

19. ————, power of Court to review decision of judge at Nisi Prius as to evidence 699
See EVIDENCE. 3.

20. ————, on misjoinder of plaintiffs 748
See PARISH LAW.

PREPAYMENT to agent, effect of 186
See PRINCIPAL AND AGENT. 2.

PRINCIPAL AND AGENT—*Architect and Builder.*] The defendant employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it for him. The architect took out the quantities, and represented to the plaintiff, a builder, that they were correct, and the plaintiff thereupon made a tender, which was accepted. The quantities proved to be incorrect, and the plaintiff expended upon the building a much larger amount of materials than he contemplated:—*Held*, that there was no evidence that the architect acted as the defendant's agent in taking out the quantities, or that the defendant guaranteed their accuracy, and that, therefore, the plaintiff could not recover more than his contract price.
SCRIVENER AND ANOTHER *v.* PASK .. .. Ex. Ch. 715

2. ———— *Prepayment — Payment in the ordinary course of business.*] A., a broker, sold some cotton yarn to the defen-

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dant. Before its delivery the defendant paid to A. in advance 1000*l.* on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than 1000*l.*, the defendant paid the difference to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt:—*Held*, that the defendant was still liable to the plaintiff for the price of his yarn, except to the extent of the cash payment: the advance of 1000*l.* to A. not amounting to a prepayment, because it was on the general account; and the settlement of accounts not constituting payment as against the plaintiff: as an agent, whether acting on a *del credere* commission or not, is only authorized to receive payment in cash, in the absence of any practice or custom to the contrary.

CATTERALL *v.* HINDLE 186

3. PRINCIPAL AND AGENT, liability of one of several joint owners of ship, on contract of agent appointed by managing owner 649
See SHIP AND SHIPPING. 1.

4. ———————, authority of directors of company to make contracts 674
See COMPANY. 1.

5. ———————: *See* FIRE INSURANCE.

PRINCIPAL AND SURETY—*Discharge of Surety by Alteration in the Contract—Bond, divisibility of condition.*] When one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other. By agreement between the plaintiff and S., the plaintiff agreed to purchase of S. the ship *Devonport*, the price being a sum of money and the transfer to S. of the plaintiff's ship the *Lord Dalhousie*. The plaintiff also agreed to lend S. 6000*l.* on mortgage of the *Lord Dalhousie*; and S. agreed to repair her, so as to class her eight years A 1 at Lloyd's; and also to do anything remaining to be done to the *Devonport* within two weeks after that ship's arrival in London. The defendant, as surety for S., gave his bond to the plaintiff, conditioned to be void if S. forthwith repaired the *Lord Dalhousie*, and if S., within the two weeks mentioned, did all that remained to be done to the *Devonport*. The plaintiff and S. afterwards, without the knowledge of the defendant, made another agreement, whereby the time within which the *Devonport* was to be completed was shortened, and more was to be done to her than was included in the original agreement:—*Held*, that the conditions in the bond as to the *Lord Dalhousie* and the *Devonport* were separate and distinct; and that the defendant, though released (by the alteration made by the second agreement in the terms of the first) from his liability so far as related to the completion of the *Devonport*, was not released from his liability in respect of the *Lord Dalhousie*.

HARRISON *v.* SEYMOUR 518

2. ——————— *Liability of Surety—Increase of the Duties of the principal Debtor—Pleading.*] Action on a bond conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewers rates for the parish of St. Anne; the bond to continue in force if A. held either office separately. Breach that A. received money in both capacities and failed to pay it over. *Plea*, that before breach an act was passed increasing A.'s duties as collector of sewers rates, and under which he was also elected collector of main drainage rates by the persons under whom he held his other

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appointments :—*Held*, bad on demurrer, on the ground that the bond was divisible, and that the plea afforded no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates.
SKILLETT AND OTHERS *v.* FLETCHER AND ANOTHER 217

PRIVATE ARRANGEMENT ACT (7 & 8 Vict. c. 70) 256
See BANKRUPTCY. 3.

PROFITS OF BUSINESS, effect of receipt of 86
See PARTNERSHIP.

PROMISE, IMPLIED, in contract 615
See CONTRACT. 2.

PROTECTION from arrest in bankruptcy 658
See BANKRUPTCY. 4.

PROTECTION ORDER, effect of, under 12 & 13 Vict. c. 106, s. 112 .. 204
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PROTEST, tender under, is good 596
See TENDER.

PROVISIONAL SPECIFICATION of patent, form of 192
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PROVISIONS, what reasonable, in deed under Bankruptcy Act, 1861 373, 585
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PROXIMATE CAUSE of loss, what, within policy of Fire Insurance .. 232
See FIRE INSURANCE.

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See SALE OF GOODWILL.

PURCHASER, when stoppage in transitu is valid 431
See SALE OF GOODS.

QUALIFICATION of voter for Parliament 129, 133, 138, 148, 155
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QUIET ENJOYMENT, measure of damages on breach of covenant for .. 441
See MEASURE OF DAMAGES. 4.

RAILWAY AND CANAL TRAFFIC ACT, 1854, grant of injunction under 588
See CARRIERS. 2.

RAILWAY, CARRIERS BY : *See* CARRIERS.

RAILWAY COMPANY—*Acceptance of Bills of Exchange—Ultra vires—Pleading.*] It is not competent to a company incorporated in the usual way for the formation and working of a railway, to draw, accept, or indorse bills of exchange : and the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors and under the common seal of the company.
BATEMAN *v.* THE MID-WALES RAILWAY COMPANY ; THE NATIONAL DISCOUNT COMPANY, LIMITED *v.* SAME ; OVEREND, GURNEY, & Co., LIMITED *v.* SAME 499

2. ———————, *Compensation under s.* 68 *of the Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18)—*Award including Matter in respect of which Claimant not entitled to Compensation.*] To an

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action against a railway company upon an award of an arbitrator, appointed to determine a claim under the Lands Clauses Consolidation Act, 1845, whereby the arbitrator found that the claimant had sustained damage by reason of his messuage being injuriously affected by the execution of the works mentioned in and authorized by the company's special act, "to wit, by the erection of an embankment *and by the narrowing of the road* in front of the said messuage," to the amount of 80*l*., which sum he directed the company to pay to the claimant,—the defendants pleaded (setting out the award, which recited the act of parliament and the agreement of reference) that the plaintiff's said messuage was not, nor was his interest therein, injuriously affected by the narrowing of the road, and that the sum awarded included money of uncertain amount which the arbitrator awarded for compensation for damage sustained by the plaintiff by reason of his messuage being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the road, by reason whereof the award was void:—*Held*, on demurrer, a good plea.

BECKETT *v.* THE MIDLAND RAILWAY COMPANY 241

RAILWAY COMPANY, effect of negligence of one company having running powers over line of another 385
See CARRIERS. 1.

————————, negligence of, in not providing proper accommodation at a station 300
See NEGLIGENCE. 2.

————, amalgamation, effect of, upon contracts 269
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RECOGNIZANCE given by appellant, on a case stated under 20 & 21 Vict. c. 43, s. 3, need not be given within the three days mentioned in s. 2; it is enough if this is done before the case is given out by the justices 423
See CATTLE.

RECORD, nothing that is inconsistent with, can be averred 171
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See BANKRUPTCY ACT, 1861. 2.

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See CLERK OF THE PEACE.

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RENT, acceptance by remainder-man of, paid to receiver appointed by Court of Chancery, effect of 9
See WILL.

RENT-SECK, what, within 4 Geo. 4, c. 28, s. 5 133
See PARLIAMENT 7.

RESIDENCE AND OCCUPATION of maker of bill of sale, what sufficient description of 513
See BILL OF SALE.

REVISING BARRISTER, power of, to expunge vote 138
See PARLIAMENT. 4.

RIGHT TO TOLL: *See* TURNPIKE ACTS.

RULE OF COURT, what sufficient submission to be made 671
See ARBITRATION. 2.

RULES OF COURT, of Easter Term, 1856, effect of 557
See PRACTICE. 6.

RUNNING POWERS, effect of negligence of one company who have, over line of another railway company 385
See CARRIERS. 1.

SALE OF GOODS—*Vendor and Purchaser—Unpaid Vendor—Stoppage in transitu.*] On the 12th of July, 1864, W. sold P. eleven skips of cotton twist, then lying at the defendants' station at S., to be delivered for P. at B. station. Three of the skips were delivered on the 22nd, and paid for; but P. objecting to the weight and quality, declined to take any more of them. On the 17th of August, four more were sent to B. station, and an invoice of the eight was sent to P., with an intimation to him that four had been forwarded, and that the remaining four were lying at S. station waiting his instructions. P. immediately returned the invoice, and wrote to W., saying that he declined to take any more of the twist. On the 1st of September, W. sent an order to S. station, directing the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and were taken by P.'s carman to his mill, but were immediately returned by P.'s orders; and the whole eight were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but, P. refusing to have anything to do with them, they remained there until P.'s bankruptcy on the 19th of October, when W. claimed them:—*Held*, upon a special case stated in an action of trover by P.'s assignee against the railway company, in which the Court were to draw inferences of fact, that, under the circumstances, the transitus was never determined, and consequently that the unpaid vendor, W., had a right to stop them.
BOLTON *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY 431

SALE OF GOODWILL—*Vendor and Purchaser—Title.*] A., being tenant from year to year of a public-house, agreed to let to B. "all his right, title, and interest" in the premises for 1000*l.*, and to assign over to him the beer and other licences, and to sell him the fixtures, stock, &c., at a valuation; and B. agreed to accept the house and premises, "having a good title to the licences," to pay a deposit of 100*l.*, and the balance on completion," &c. Proviso, that, if B. should not be accepted as a tenant by F. & H., the superior landlords, at a certain rent, and subject to the terms named in the margin (which were, "Messrs. F. & H. agree to grant B. a lease of thirty-five years, at 200*l.* rent," &c.) the deposit to be returned, and this agreement void:—*Held*, that this agreement was not well declared on as a contract on

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the part of A., that F. & H. should grant B. a lease on the terms mentioned, and make a good title; it being in substance only an agreement for the sale by A. of his interest such as it was, with a proviso that the contract should be void if a valid lease from F. & H. could not be obtained.
TWEED *v.* MILLS 39

SEAWORTHINESS, implied warranty of, does not extend to lighters employed to land the cargo 412
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SERVANT: *See* MASTER AND SERVANT.

SERVICE OF WRIT abroad, practice as to 46
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SERVICE UNDER ARTICLES, effect of articled clerk holding office of steward of a manor during 473
See ATTORNEY. 1.

SET-OFF, meaning of "admitted set-off," in 19 & 20 Vict. c. 108, s. 24 .. 576
See COUNTY COURT. 1.

SEWING-MACHINE, construction of letters patent relating to 192
See PATENT. 2.

SHERIFF, measure of damages in action against, for an escape 403
See MEASURE OF DAMAGES. 3.

SHIP AND SHIPPING—*Authority of Agent—Liability of Joint Owner—Construction of Bill of Lading—Custom as to weighing.*] Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "*nett weight delivered.*" On arrival in London, the agent appointed by the managing owner demanded freight *on the weight mentioned in the bill of lading*, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against the defendant,—one of the joint owners,—to recover back the excess. The jury having negatived the alleged custom:—*Held*, that the defendant was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, and that no part of the money had come to his hands.
COULTHURST AND ANOTHER *v.* SWEET 649

2. ————————, *Bill of Lading—Barratry—Perils of the Sea—Gross Negligence—Depositions under a Commission—Admissibility of Evidence—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 299.] The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), was not intended to alter the relation between shipowners and shippers, and the 299th section, which provides that a loss arising from the non-observance by a ship of the rules laid down by the act shall be deemed to have been occasioned by the *wilful* default of the person in charge of the deck, does not render a breach of the rules barratry, unless it was intentional. A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in a bill of lading. Therefore, where a shipowner, by a bill of lading, undertook to deliver safely certain goods "barratry of master or mariners, accidents, or damage of the seas, rivers, or navigation, of whatever nature or kind soever, excepted," and the ship came into collision with another, in consequence

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of starboarding her helm, in contravention of the rules of the Merchant Shipping Act, 1854, then in force, and sank, and the goods were lost:—*Held*, that the shipowner was liable for the value of the goods.

Gross negligence is a relative term, and means the absence of the care that was requisite under the circumstances. Therefore, where a replication alleged that the collision by which the goods were lost, occurred through the gross negligence of the defendants, and the judge did not ask the jury whether the defendants had been guilty of gross negligence, but left it to them to say whether the defendants had exercised due care in the conduct of their ship:—*Held*, a right direction.

In an action on a bill of lading for the non-delivery of goods lost by the defendants' negligence, the judge left it to the jury to say whether the collision, by which the loss was caused, was occasioned by the negligence of the defendants. There was no evidence whatever that the loss of the goods could have been prevented if the collision took place:—*Held*, that the question to be decided was, whether the loss of the goods, and not whether the collision, was caused by the negligence of the defendants; but that, considering the evidence, there was no misdirection.

Any irregularity in the mode of taking depositions under a commission should be the subject of an application at judges' chambers, and is not a ground for refusing to receive the depositions at the trial. Therefore, where a commission having been issued to examine witnesses at M. by written interrogatories and vivâ voce, one of the witnesses named in the commission was not examined, and the examination was conducted entirely vivâ voce, the written interrogatories that had been prepared not being administered:—*Held*, that if this was an irregularity, it could only have been taken advantage of by an application at chambers, and was no ground for refusing to admit the depositions at the trial.

Semble, that it was not an irregularity.

GRILL *v.* THE GENERAL IRON SCREW COLLIER COMPANY, LIMITED 600

3. SHIP AND SHIPPING—*Bill of Lading—Lien for Freight.*] A charter-party contained the following clause—"The ship to have a lien on cargo for freight, 3*l.* 10*s.* per ton of fifty cubic feet, measured in Shanghai, to be paid to the captain or his agents on right delivery at port of discharge . . . . the freight to be paid on unloading and right delivery of the cargo." The charterers shipped part of the cargo themselves under a bill of lading, containing the following clause—"Freight for the said goods payable in Liverpool as per charterparty." The charterers having indorsed this bill of lading to A. for valuable consideration:—*Held*, that as against A. the shipowner had a lien only for the freight due for the goods included in the bill of lading, at the rate of 3*l.* 10*s.* a ton, and not a lien for the whole chartered freight.

FRY AND OTHERS *v.* THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA 689

4. ——————, *Bill of Lading—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 67—*Power of Shipowner to land Goods.*] By proviso in a bill of lading, simultaneously with the ship being ready to unload the whole or any part of the goods (forty pipes of lemon juice), the consignee was bound to be ready to receive the same from the ship's side; and in default, the master or agent of the ship was authorized to enter the goods at the custom-house, and land, warehouse, or place them in lighters at the risk and expense of the consignee. After part of the goods had been landed by the ship-

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owner, but not before, the consignee was ready and offered to receive the remainder, but the shipowner refused to deliver them to him, and landed them himself:—*Held*, that the contract was divisible; and that unless the shipowner had been prejudiced in the delivery of the remainder, by the default of the consignee in not being ready to receive the whole, he was bound to deliver them.

Semble, that the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 67, arts. 5 & 7, should be similarly construed.

WILSON AND ANOTHER *v.* LONDON, ITALIAN, AND ADRIATIC STEAM NAVIGATION COMPANY, LIMITED 61

5. SHIP AND SHIPPING—*Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 3—*Fraud of Shipper.*] A bill of lading represented a larger number of bales to have been shipped on board a vessel than were really shipped. This arose from the mistake of the mate, which there was some evidence to shew was caused by the fraud of the person who put the goods on board. The latter was either agent of the person named as shipper in the bill of lading or his vendor:—*Held*, that there was evidence to go to a jury that the misrepresentation was caused "wholly by the fraud of the shipper or of the holder, or some person under whom the holder claimed," within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 3.

VALIERI AND ANOTHER *v.* BOYLAND 382

6. ————————, *Charterparty—Delay—Deviation—Condition precedent.*] A charterparty contained a clause that the ship should "with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to E., and there load a full cargo of cotton." This the freighters bound themselves to ship. The ship deviated to C. and arrived at E. a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of this delay.

In an action against the freighter for not loading a cargo:—*Held*, that the above clause was a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighter for refusing to load a cargo; but that his remedy for any damage that had accrued by reason of the delay was by cross-action.

Semble, by Willes, J. If the delay had entirely defeated the object of the freighters in taking up the vessel, it would have afforded an answer to the action.

MACANDREW AND OTHERS *v.* CHAPPLE AND ANOTHER 643

7. ————————, *Charterparty, Construction of—Prepayment on account of Freight—Terminable Interest—Lien.*] Coals were shipped at Sunderland on the plaintiff's account under a charterparty between one De M. and the defendant (the owner of the vessel), whereby and by the bill of lading they were deliverable at Alexandria "to order or assigns," on payment of freight as per charterparty. The charterparty also contained the following stipulations:—"The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange; one half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading: owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same." On the 31st of October, 1863, De M. handed his acceptance at three months' date for one half of the freight to the agents for the ship, who thereupon indorsed upon the bill of lading, "Received on account of the within freight 301*l.* 17*s.* 6*d.*, as per charterparty." De M. indorsed the bill of lading in blank, and forwarded it to the plaintiff at Alexandria, who, on the ship's arrival there, *on the 5th of January*, 1864, demanded the coals on payment

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of the balance of the charter freight. The master, however, having received information that De M. (whose acceptance was then outstanding) had become bankrupt, refused to deliver the cargo unless the full freight was paid or a guarantee given for its payment. B. & Co., the plaintiff's agents, thereupon gave the required guarantee, and the coals were delivered, and the full freight ultimately paid under protest:—*Held*—affirming the judgment of the Court of Common Pleas—that the defendant had no lien upon the cargo for the half-freight represented by De M.'s acceptance, and that the plaintiff was entitled to recover it back, either as damages in an action for a wrongful conversion, or as money received to his use.

TAMVACO *v.* SIMPSON .. .. Ex. Ch. 363

8. SHIP AND SHIPPING—*Charterparty—Substituted Contract—Construction of Guarantee—Time of Breach.*] The defendants chartered two vessels of 300 tons each for a voyage from Ibraila to London with full cargos of petroleum, at 84*s.* per ton. In consequence of their stores at Ibraila having been destroyed by fire, they were unable to furnish any oil; and the owners agreed to cancel the charterparties and to procure other cargos upon the defendants guaranteeing each vessel "a sum of 900*l.* gross freight home." The homeward cargos shipped under the substituted contract fell short of the guaranteed sum for each vessel by 343*l.* 6*s.* One of the vessels arrived in safety; the other was lost:—*Held*, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one.

CARR AND ANOTHER *v.* THE WALLACHIAN PETROLEUM COMPANY, LIMITED 636

9. ———————, *Construction of Charterparty—Master's Duty in loading the Ship.*] It is no answer to an action against a shipowner for not loading a full cargo, pursuant to a charterparty which contained a stipulation that "the charterer's stevedore was to be employed by the ship," that the charterer had failed to appoint a stevedore,—the charterer's option so to do not dispensing with the ordinary duty of the master properly to load the ship.

THE ANGLO-AFRICAN COMPANY, LIMITED *v.* LAMZED AND OTHERS 226

10. ———————, *Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104)—*Measurement of Tonnage of Steam-vessels—Allowance for Space occupied by the propelling Power.*] The 29th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which impowers the Commissioners of Customs, with the approval of the Board of Trade, to make "such modifications and alterations as from time to time become necessary in the tonnage-rules thereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted," does not authorize them to make rules for the measurement of the tonnage of steam-vessels, which will have the effect of altering the allowance in respect of the space occupied by the propelling power, as provided by s. 23. So held by the Exchequer Chamber, affirming the judgment of the Common Pleas.

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SUPPORT FROM ADJOINING LAND—*Cause of Action—Appreciable Damage.*] The right of the owner of land to the lateral support of his neighbour's land is not an absolute right, and the infringement of it is not a cause of action without appreciable damage. Therefore, where A. dug a well near B.'s land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B.'s land, the land would still have sunk, but

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the damage to B. would have been inappreciable:—*Held*, that B. had no right of action against A.
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TENDER—*Scire Facias against a Shareholder of a Railway Company—Costs after Judgment*—8 & 9 *Vict. c.* 16, *s.* 36.] An offer to pay, under protest, the sum claimed is a good tender. A creditor, having obtained a judgment against a railway company, gave notice to a shareholder that he was about to apply for leave to issue a scire facias against him, and the shareholder thereupon tendered, under protest, the whole sum claimed, which included 150*l.* for costs incurred since the judgment; but the creditor refused it, and obtained a rule nisi for a scire facias:—*Held*, that the tender was good, and ought to have been accepted by the creditor; and the Court discharged the rule with costs, without prejudice to another application, if the sum claimed, minus the 150*l.*, were not paid.
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THEATRE—*Entertainment of the stage, within* 6 *&* 7 *Vict. c.* 68—*Ballet divertissement—Music and dancing licence, under* 25 *Geo.* 2, *c.* 36.] The respondent represented, at a place of public entertainment in London called the Alhambra, which was licensed only for music and dancing under the 25 Geo. 2, c. 36, an entertainment called a "ballet divertissement," which was thus described by a police magistrate in a case stated for the opinion of this Court, under the 20 & 21 Vict. c. 43:—"There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side-lights, a curtain, side-scenes, drops, and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, painted to represent rocks, with a cascade of water falling among them from a place thirty feet high. On the wings and at the scenes at the back are painted palm-trees: the whole representing an oriental landscape. From sixty to seventy females, in the ordinary costume of theatrical ballet-dancers, came through a large opening at the top of the platform painted as rocks, and danced down them to the stage. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down, they defiled to the right and left. Four were placed on each side in front of the proscenium, with sham musical instruments in their hands, supposed to be played by them to the dancers. The dancers began to dance the pas des poignards (a dance which was originally brought out at Drury Lane Theatre, in an Egyptian scene), each female armed with two daggers, charging through each other's ranks, striking right and left with the daggers in mimic warfare, then in front as far as the foot-lights. This performance of the dagger-dance ended in several of the females standing over others as if in triumph, and retiring, when others came forward, holding palm-leaves in their hands, and danced,

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waving them, and formed an avenue, as if expecting an arrival; then a female dancer, who at regular theatres would be called a première danseuse, passed down the avenue formed by the other dancers, who retired, while she performed a pas seul, with gestures:"—*Held*, that, upon this statement, the Court could not hold, as a matter of law, that the performance thus described was an "entertainment of the stage," within the 23rd section of the 6 & 7 Vict. c. 68. The majority of the Court, however, thought that, if they were dealing with it as a matter of fact, it would be.

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———— ACTS (3 *Geo.* 4, *c.* 126), *s.* 32—*Public Stores.*] By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her Majesty's forces is exempt from toll. A., a contractor for the supply of forage for the use of her Majesty's forces, delivered to B. hay to be carried by him to one of the government stores in performance of A.'s contract, by the terms of which the deputy commissary-general had a right to reject it on its arrival if of inferior quality:—*Held*, that the waggon in which B. conveyed the hay was within the exemption.

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2. ————————, (3 *Geo.* 4, *c.* 126; 9 *Geo.* 4, *c.* 77; 14 & 15 *Vict. c.* 38)—*Right to Toll—Thrashing Machines—Repugnance of a later to a former Act.*] The General Turnpike Act (3 Geo. 4, c. 126), s. 4, enacts that all its provisions shall extend to all turnpike acts that shall be thereafter passed, except as to things expressly referred to and varied by such acts: and s. 32, that all implements of husbandry shall be exempt from toll. By 9 Geo. 4, c. 77, s. 19, it is provided that the General Turnpike Act shall extend to every local act as fully as if it were re-enacted in such act. By 14 & 15 Vict. c. 38, s. 4, it is provided that implements of husbandry, when mentioned in the General Turnpike Act, shall include thrashing machines. By a local act it was provided in the interpretation clause that cart should include

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thrashing machine; and in a subsequent section, which was the only section in the act to which this interpretation could apply, that a toll of 6*d.* should be payable on every horse drawing a cart:—*Held*, that the local act did expressly refer to and vary the provisions of the General Act, and that thrashing machines were liable to toll. *Semble*, any provisions in a local act repugnant to those in the General Act would override them, even though not expressly referring to the things and matters in the General Act.
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WILL—*Devise—Leasing Power—Mining Lease—Receiver.*] A testator, by a will made in 1798, devised all the residue of his real estates to his daughter for life, without impeachment of waste, save as hereinafter mentioned, and with a restriction against alienation, remainder to

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her first and other sons in tail, with some other remainders, remainder to T. P. in tail, remainder to the testator's right heirs. The will contained powers to the devisee for life to charge the property to a limited extent in favour of her husband and children; and it then gave to her, and to each tenant in tail, power to lease any of the *lands* for twenty-one years, and no more, for the best improved rents that could be got for them, with a reservation to the lessor of the right to work and take mines and minerals thereunder. Then followed a special reservation of all timber, woods, and underwood for twenty years from the testator's death. The will then proceeded: "And it is my will and desire, and I do hereby order and direct. . . . . *that it shall and may be lawful for my said daughter to work, or contract for, lease, or let out to be worked and wrought,* all the coal, culm, &c., or other ore, mines, and minerals which are already known and discovered, or which may be hereafter found out and discovered in or under my real estates," the "issues, proceeds, and profits," to be paid over to trustees, and to be by them laid out in the purchase of lands, to be settled to the same uses, &c., as the rest of the testator's estate. The devisee for life, who was the testator's only child, in 1840, in the exercise of this power, demised to M., for *twenty-one* years (or for *sixty* years, if she had authority to do so), "all the mines, &c., of coal, culm, &c., under three farms described, with liberty to the lessee, his executors, &c., to use all lawful means for finding any coal or culm, and raising it and disposing of it; to make shafts, watercourses, and railroads, and to use a sufficient part of the said land for placing coal to be raised therefrom, *and also any other coal;* to erect engines for working the said mines, *or any other mines;* to build houses for the miners working the demised mines, *or mines belonging to any other person;* to do all such other acts in, under, or upon the said farms *as shall be deemed expedient in working the mines and seams of coal hereby demised,* or *belonging to any other person;* and to have ingress and egress for customers to carry away coal from the said mines, or *belonging to any other person;* making satisfaction to the tenants and occupiers for any damage occasioned by the liberties aforesaid." An annual rent of 40*l.* and certain royalties were reserved, and the lessee covenanted to pay rent, &c., to work the mines in a workmanlike manner, to make satisfaction for damage, &c. In ejectment by T. P., the remainder-man, against the lessee, the jury having found that the covenants contained in the lease were "usual, ordinary, and reasonable" covenants:—*Held,* by Erle, C.J., and Willes, J., that the will gave the devisee for life an unconditional power to lease the mines, without any other limit for the duration of such leases, and any other condition for the exercise of the power, than would attach to and arise from the fiduciary capacity of the donee of the power; and that the lease of 1840 was a good exercise of that power; for that, if some of the licences thereby granted were ultra vires, the lease might be void pro tanto, and valid for the residue. *Held,* by Byles, and Montague Smith, JJ., that the provision as to mining leases had reference to the restrictions upon the right of the tenant for life to commit waste, mentioned in the earlier part of the will, and was a mere *working power* over the minerals, given to the tenant for life, accompanied with restrictions as to the disposition of the proceeds, compelling her to capitalise the issues and profits for the benefit of those in remainder; and, consequently, that the lease was void, or, at all events, could not extend beyond the life of the devisee for life. *Held,* by the whole Court, that the receipt of rents, under a lease made by tenant for life in the supposed exercise of a power conferred upon her by a will, by a receiver appointed by the Court of Chancery during the minority of the remainder-man, does not create a tenancy from year to year; nor does the acceptance by the remainder-man from the receiver, on attaining his

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.